

IN THE
Supreme Court of the United States

OCTOBER TERM, 1976

Supreme Court, U. S.

FILED

APR 26 1977

MICHAEL RODAK, JR., CLERK

No. **76-1484**

JAMES ZURCHER, individually and as Chief of Police of the City of Palo Alto, County of Santa Clara, State of California, JIMMIE BONANDER, PAUL DEISINGER, DONALD MARTIN and RICHARD PEARDON, all individually and as Police Officers of the City of Palo Alto, County of Santa Clara, State of California, LOUIS P. BERONA, individually and as District Attorney for the County of Santa Clara, State of California, and CRAIG BROWN, individually and as Deputy District Attorney for the County of Santa Clara, State of California,
Petitioners,

vs.

THE STANFORD DAILY, FELICITY A. BARRINGER, FRED MANN, EDWARD H. KOHN, RICHARD LEE GREATHOUSE, ROBERT LITTMAN, HALL DAILY and STEVEN G. UNGAR,
Respondents.

**PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit**

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Respondents.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this matter on February 2, 1977.

OPINIONS BELOW

The February 2, 1977, opinion of the Court of Appeals, as yet unreported, appears at Appendix A, *infra*, pp. 1-6. The three prior opinions of the United

States District Court for the Northern District of California, also reprinted in the Appendix, are reported as follows:

1. 353 F. Supp. 124 (N. D. Cal. 1972); decided October 5, 1972; propriety of search warrant and search; appears at pp. 9-36 of Appendix;
2. 366 F. Supp. 18 (N. D. Cal. 1973); decided August 10, 1973; right to attorneys' fees; appears at pp. 37-53 of Appendix; and
3. 64 F.R.D. 680 (N. D. Cal. 1974); decided July 17, 1974; computation and amount of attorneys' fees; appears at pp. 55-71 of Appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on February 2, 1977. A timely petition for rehearing and suggestion that rehearing be in banc was denied on March 28, 1977 (App. B, *infra*, p. 7). The jurisdiction of this Court is invoked pursuant to 28 USC Sec. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Civil Rights Act of 1871, 42 USC, Sec. 1983, provides in pertinent part as follows:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured

in an action at law, suit in equity, or other proper proceeding for redress."

2. The Fourth Amendment to the Constitution of the United States provides as follows:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

3. Section 1524 of the Penal Code of the State of California provides in pertinent part as follows:

"A search warrant may be issued upon any of the following grounds:

4. When the property or things to be seized consist of any item or constitute any evidence which tends to show a felony has been committed, or tends to show that a particular person has committed a felony.

The property or things described in this section may be taken on the warrant from any place, or from any person in whose possession it may be."

4. Section 1528 of the Penal Code of the State of California provides as follows:

"If the magistrate is thereupon satisfied of the existence of the grounds of the application, or that there is probable cause to believe their existence, he must issue a search warrant, signed by him with his name of office, to a peace officer in his county, commanding him forthwith to

search the person or place named, for the property or things specified, and to retain such property or things in his custody subject to order of the court as provided by Section 1536."

5. The First Amendment to the Constitution of the United States provides in pertinent part as follows:

"Congress shall make no law . . . abridging the freedom of speech, or of the press"

6. Public Law No. 94-559, 90 Stat. 2640 (October 19, 1976), provides in pertinent part as follows:

"In any action or proceeding to enforce a provision of sections . . . 1979 [42 USC Sec. 1983] . . . of the Revised Statutes, . . . the Court, in its discretion, may allow the prevailing party other than the United States, a reasonable attorneys' fee as part of the costs."

QUESTIONS PRESENTED

1. Does the Fourth Amendment allow only premises of a criminal suspect to be searched? Otherwise must a subpoena duces tecum be impracticable before a search warrant may issue? If the Fourth Amendment alone does not impose such requirements, are they required in conjunction with the First Amendment where photographs of a riot, unobtainable elsewhere, are sought by warrant from a student newspaper?

2. Where a warrant is fair on its face and the affidavit is sufficient under current statutory and case law:

(a) Are the police officers who serve the warrant liable under Section 1983 where additional facts were not set forth in the affidavit?

(b) Is the Chief of Police, who neither knew the warrant was being sought nor participated in its execution, liable on a respondeat superior theory?

3. Was it the intent of Congress that the Civil Rights Attorney's Fees Awards Act of 1976 be applied retroactively to services rendered prior to its effective date? If so, would it be manifestly unjust to so apply the Act to these petitioners?

STATEMENT OF THE CASE

In this Section 1983 civil rights case petitioner police officers of Palo Alto, California, were held liable to a student newspaper and staff members for service of a search warrant undocumented as to a new element of probable cause. The premises to be searched were not those of a known criminal suspect. Failing this, the district court held, the supporting affidavit must show why a subpoena duces tecum would be impracticable. (App. C, pp. 14, 26.)

The warrant arose from a 1971 riot at a hospital and was directed to photographs of the demonstration believed on the *Stanford Daily* premises and unobtainable elsewhere. This evidence was critical both to obtaining felony convictions for the injuries and damage inflicted, and to identifying the suspects in the first instance. (The *Daily* previously had announced

its intention to destroy such evidence rather than allow it to be used in criminal prosecutions.)

The warrant and supporting affidavit were adequate as to format, traditional probable cause, and California law. Summary judgment was granted on the sole basis that additional facts concerning the impracticability of a subpoena duces tecum were not included in the affidavit, thereby rendering the warrant invalid under the Fourth Amendment. (App. C, pp. 14-26.) The First Amendment aspect of the case was not essential to the ruling. (App. C, pp. 26-28.)

The five police officers were held in as defendants, over their objection, because they served the warrant (a respondeat superior basis in the case of the Chief of Police). The warrant itself was fair on its face, and the district court pointed to no misconduct on the part of the police defendants. Injunctive relief was denied. (App. C, pp. 35-36.)

The district court awarded \$47,500.00 as attorney fees on an expanded version of the "private attorney general" theory, a theory disaffirmed by this Court while the case was being appealed to the Ninth Circuit. The Ninth Circuit upheld the award by retroactively applying the Civil Rights Attorney's Fees Awards Act of 1976. (App. A, pp. 4-6.)

The Ninth Circuit affirmed the district court's judgment (App. A, pp. 1-6) and denied a petition for rehearing in banc. (App. B, p. 7.)

REASONS FOR GRANTING THE WRIT

1. THE EXTRAORDINARY PROBABLE CAUSE REQUIRED BELOW UNREASONABLY BURDENS EFFECTIVE LAW ENFORCEMENT AT ALL GOVERNMENTAL LEVELS.

The public importance and far-ranging effect of the Fourth Amendment issue is clear. The district court did not, and indeed could not, limit its opinion to the facts of the case, tie together the Fourth and First Amendment aspects, or ground its decision on some peculiarity of California law. The holding is by its nature unconditional and sweeping: Any warrant is unconstitutional unless the premises are those of the suspect or the affidavit shows that a subpoena duces tecum will be impractical. The Ninth Circuit adopted this opinion without limitation. (App. A, p. 2.) Thus, this unprecedented extension of the Fourth Amendment's probable cause language is made applicable to the federal government and the states in all warrant contexts.

The issue was wrongfully decided. As this Court recognized in *Branzburg v. Hayes*, 408 U.S. 665, 690, law enforcement is a fundamental function of government. A warrant is an important investigatory tool. As Mr. Justice Stewart noted in *Fuentes v. Shevin*, 407 U.S. 67, 93, n.30, a search warrant serves "a highly important governmental need—e.g., the apprehension and conviction of criminals" and "is generally issued in situations demanding prompt action." The decision below, however, will cut back severely the instances in which a warrant may be employed in "nonsuspect" situations. (The District Attorney's Office for Santa Clara County, California, has esti-

mated that 20 percent of its warrants are of this variety.)

It is black-letter law that probable cause means the facts and circumstances warranting a person of reasonable caution in the belief that seizable items are in the stated place. No more is required by the Fourth Amendment on its face or as construed by this Court. The unprecedented extension of the probable cause language below sets the stage for virtually warrant-free sanctuaries. Thus, the premises of a friend, sweetheart, or relative can safely conceal evidence or the ill-gotten gains of the criminal. Even the criminal's own abode is a taboo area until formal suspect status is attached, an unlikely event if a warrant cannot issue for the evidence linking the person to the crime.

The decision below clearly is unreasonable. To require suspect status before evidence establishing such suspicion can be garnered (as in this case) puts the proverbial cart before the horse. It bears no discernible relationship to traditional probable cause: One's status vis-a-vis the investigation has little, if anything, to do with whether the items sought will be found in the stated place. Furthermore, the necessary assumption that a nonsuspect will comply with a subpoena (or that the government can reasonably be expected to uncover positive proof to the contrary) is unsupported guesswork.

It follows that the decision below cannot be upheld on the basis of the Fourth Amendment. It cannot be upheld on the more limited First Amendment grounds

either in light of the *Branzburg* decision, *supra*, 408 U.S. 665, and related decisions establishing that newsmen have no special privilege to withhold information from the judicial system. By the same token, a newspaper has no exemption from a narrowly-drawn warrant grounded upon traditional probable cause. If the press is required to divulge evidence pursuant to subpoena, surely evidence also can be obtained by a warrant embodying the constitutional protections extended to others and found sufficient for nearly 200 years.

2. SECTION 1983 LIABILITY WAS ERRONEOUSLY EXPANDED TO INCLUDE PERSONS WITHOUT FAULT OR EVEN INVOLVEMENT IN THE EVENTS GIVING RISE TO THE CIVIL RIGHTS DEPRIVATION.

In serving the warrant, the police officers neither acted in bad faith nor knew, or should have known, that the supporting affidavit was insufficient. (Chief Zurcher himself had literally no involvement in the events, not even foreknowledge that a warrant would be issued.) Nevertheless, these petitioners along with their co-defendants were held to have violated plaintiff's civil rights. The legal theory for imposing liability on these petitioners never was articulated.

In effect, Section 1983 liability has been expanded by applying *sub silentio* a "no fault" theory allowing unbridled discretion to hold anyone peripherally involved. The liability in this case was not only declaratory relief, but also an attorney fee award of \$47,500.00.

This was egregious error. Two elements must be proven under Section 1983: (1) A deprivation of a

constitutional right by the defendant, and (2) that the defendant acted under color of state law. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144. A Section 1983 action must be analyzed in accordance with tort principles. See, *Rizzo v. Goode*, 423 U.S. 362, 370-373; *Bowens v. Knazze*, 237 F. Supp. 826 (N.D. Ill. 1975). In this case, as in others which may follow its lead, petitioners themselves did not breach any duty owed to plaintiffs by serving a warrant fair on its face.

The ramifications of the decision below are far-reaching. Obviously, injustice is done to any person unnecessarily embroiled in litigation. The injustice is magnified where, as here, police officers' records are irreparably blotted, the unsupported finding having been made that they deprived others of civil rights. The injustice is compounded by making such persons liable for attorney fee awards payable from their own pockets or passed on to their innocent employers.

The unseemingly spectacle of government agents secondguessing the validity of court orders and refusing to execute the same when in doubt, lest they be held liable for some inherent error, is more than a mere possibility now. The result, indeed, is almost commanded by the decision below.

We also must anticipate that government agents will be less inclined to utilize valuable warrants to avoid the possibility of personal liability for a magistrate's "errors."

The expansion of Section 1983 liability below by its nature affects the many diverse situations which

can arise under Section 1983. The types of situations in which persons with minimal involvement can be caught in a Section 1983 net are limited only by one's imagination. We submit that the erroneous decision below must be rectified. It expands Section 1983 liability beyond legislative intent and the bounds of justice.

3. THE CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976 SHOULD NOT BE RETROACTIVELY APPLIED IN GENERAL OR IN THIS CASE.

The decision of the Ninth Circuit recognized that *Alyeska Pipeline Service Company v. The Wilderness Society*, 421 U.S. 240 (1975) did away with the legal basis for the fee award given to respondents by the district court, which fees were initially awarded August 10, 1973.

While the decision of the district court was pending on appeal, Congress enacted Public Law No. 94-559, 90 Stat. 2640 (October 19, 1976) authorizing attorneys fees to the prevailing party in Section 1983 cases. The Ninth Circuit then held that such new law applied retroactively to the instant case not only from the standpoint that this case was pending at the time of enactment, but also for services rendered in the district court long before the effective date of the new law.

The Act does not state on its face whether it is to be applied retroactively. This issue, therefore, is one of general importance for all Section 1983 cases pending before enactment of the Act.

The decision of the Ninth Circuit reviewed the legislative history and found, without adequate basis therein, that the new law revalidated the fees awarded for services rendered some three years before the effective date. The Court pointed to 122 Cong. Rec. 17052 (daily ed. September 29, 1976) for the principle that the new law would not only operate on cases filed after its effective date, but would also apply to pending cases. However, this history also states that the Act is retroactive only to the extent of pending cases being capable of fee awards and does not in any way clearly state that fees should be awarded for services rendered prior to its effective date. Taking the legislative history as a whole, it is fairly debatable whether Congress intended that fees should be awarded at all for such services.

The decision of the Ninth Circuit was further in error in that it did not consider the rule of not applying new legislation retrospectively where "manifest injustice" would result as discussed in *Bradley v. The School Board of the City of Richmond*, 416 U.S. 696 (1974).

According to *Bradley*, 416 U.S. at 718, *supra*, the court must consider whether applying new law retrospectively to pending cases would result in "manifest injustice" and if so such application should not be had. In determining if such injustice occurs, the Court looks to the (a) nature and identity of the parties, (b) the nature of their rights and (c) the nature of the impact of the change in the law upon those rights.

Applying the new attorneys fees law to the instant case clearly results in manifest injustice. The instant parties are individuals and are not publicly funded governmental entities or classes of persons as found in *Bradley*. The search complained of was a one-time brief occurrence and was not a day-to-day activity whereby the parties had an ongoing and frequent relationship. Furthermore, the parties arguably had equal respective abilities to present and protect their interests.

As to the nature of the rights of the parties, the petitioners had a strict duty and right to perform the search that was commanded by the warrant since the warrant was regular on its face and fully comported with applicable warrant law at the time the warrant was actually issued and the search conducted. In fact, petitioners would be subject to contempt charges had they not executed the warrant. At such time, petitioners were not subject to impositions of attorneys fees for conducting lawful searches and had the right to perform their duties without such sanction. To now impose fees upon them for performing duties legal at the time would be to deprive them of the right to rely upon law dictating their actions and for which no sanction existed.

As to the nature of the impact of the change in the law upon the existing rights of petitioners, it should be pointed out that the new law presents new and unanticipated obligations upon these petitioners. For, how were these police officers to know that by execut-

ing a search warrant comporting with existing constitutional standards that they would be violating any rights of the respondents and that they would be subject to paying attorneys fees for merely performing their duties? At the time of the search, no law existed which proscribed the actions of petitioners in the execution of the warrant or made them liable for attorneys fees for obeying a court order. The instant case is very much different than the *Bradley* situation since the school board in *Bradley* was not conforming to well known constitutional standards regarding non-discriminatory public education and knew or should have known that it was subject to the imposition of attorneys fees for its actions. However, these petitioners were conforming to the constitutional standards known at the time and later became embroiled in litigation characterized by the district court as being one of first impression. Clearly, these petitioners had the right to defend themselves in this case and to test the declaratory judgment by appeal without having imputed to them knowledge that their defense would result in the imposition of attorneys fees under the private-attorney general theory which by case history only applied when a defendant did not comport with well known constitutional guidelines.

Accordingly, it is clear that manifest injustice would result to these petitioners if the new law applied retrospectively to them.

CONCLUSION

Wherefore, petitioners respectfully pray that a writ of certiorari be granted.

Dated, County of Santa Clara, California,
April 19, 1977.

Respectfully submitted,

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(Appendices Follow)

APPENDICES

Appendix A

United States Court of Appeals
For the Ninth Circuit

No. 74-3212

The Stanford Daily, Felicity A. Barringer,
Fred Mann, Edward H. Kohn, Richard Lee
Greathouse, Robert Letterman, Hall Daily
and Steven G. Ungar,
Plaintiffs-Appellees,
vs.

James Zurcher, individually and as Chief of
Police of the City of Palo Alto, County of
Santa Clara, State of California, Jimmie
Bonander, Paul Deisinger, Donald Martin,
and Richard Peardon, all individually and
as Police Officers of the City of Palo Alto,
County of Santa Clara, State of California,
Louis P. Bergna, individually and as Dis-
trict Attorney for the County of Santa
Clara, State of California, and Craig
Brown, individually and as Deputy District
Attorney for the County of Santa Clara,
State of California,
Defendants-Appellants.

[February 2, 1977]

Appeal from the United States District Court
for the Northern District of California

OPINION

Before: HUFSTEDLER and GOODWIN, Circuit Judges,
and EAST,* District Judge

PER CURIAM:

I

We adopt the opinion of the district court, *Stanford Daily v. Zurcher*, 353 F. Supp. 124 (N.D. Cal. 1972).

II

We reject appellants' contention that the issuing magistrate is the sole proper party defendant. Having lost in the lower court, the appellants raise this issue for the first time upon appeal. In this respect, the argument is at least, untimely. Moreover, we are not persuaded that it has merit. The appellants are proper defendants in a suit to declare that action theretofore performed were illegal and to enjoin them from acting illegally or permitting their subordinates from engaging in such illegal conduct in the future.¹ (*Cf. Schnell v. City of Chicago*, 407 F.2d 1084 (7th Cir. 1969); *Hernandez v. Noel*, 323 F. Supp. 779, 783 (1970) ("In a number of recent cases seeking damages against police officers under the Civil Rights Act,

*Honorable William G. East, Senior District Judge for the District of Oregon, sitting by designation.

¹The threat of future violation in the present case is corroborated the appellants' own pleadings: "the defendants Bergna, in his official capacity, and other persons in his office . . . will participate in the seeking of a search warrant and in the issuance of the same . . . whenever there is reasonable cause to believe that there exists property or things to be seized which consist of any item or constitute any evidence which tends to show a felony has been committed[.]"

it has been held that no liability exists unless it is alleged and proved that the officer was either present at or directed or personally cooperated in the acts relied on for liability Where injunctive relief is sought, however, no such rigid requirements obtain.".)

III

We also reject appellants' argument that their good faith in securing what turned out to be an invalid warrant insulates them from liability. The appellants rely on the rule that gives public officials a qualified immunity in damage actions under Section 1983 if the officials acted in good faith. Extension of this rule to suits like the present one, seeking injunctive and declaratory relief, has been rejected by the courts. We accept the Fourth Circuit's rationale in *Rowley v. McMillan*, 502 F.2d 1326, 1332 (1974):

" . . . [T]he immunity rule, whatever its scope, is grounded upon the inhibitory effect of suits for money damages. Manifestly, actions for injunctive relief do not have that effect. The federal defendants have cited no case, and we have found none, which holds that the immunity doctrine insulates a public official or public employee from injunctive relief to prevent what would otherwise be an illegal act on his part."

(*Accord: Hodge v. Hedrick*, 391 F. Supp. 91 (E.D. Va. 1975). See *Wood v. Strickland*, 420 U.S. 308, 315, n.6 (1975); *National Treasury Employees Union v. Nixon*, 492 F.2d 587, 609 (D.C. Cir. 1974); *Gouge v. Joint School Dist. No. 1*, 310 F. Supp. 984, 990 (W.D.

Wis. 1970); *Richmond Black Police Officers Ass'n v. City of Richmond*, 386 F. Supp. 151, 154 (E.D. Va. 1974); *Saffron v. Wilson*, — F. Supp. — (D.D.C. 1975 [slip op'n Jan. 2, 1975, No. 75-79]); *Safeguard Mutual Ins. Co. v. Miller*, 472 F.2d 732, 734 (3d Cir. 1973).)

IV

The district court awarded attorney's fees to the appellees. It applied the then prevailing law permitting such awards based on the private attorney general doctrine, and pursuant to the court's inherent equitable power. (E.g., *Brandenburger v. Thompson* (9th Cir. 1974) 494 F.2d 885.) While the case was pending on appeal, the Supreme Court decided *Alyeska Pipeline Service Co. v. The Wilderness Society* (1975) 421 U.S. 240, which severely restricted the private attorney general doctrine and destroyed the legal foundation for appellees' fee award. While this case was still pending on appeal, Congress passed the Civil Rights Attorney's Fees Awards Act of 1976 (the "Act"), 1976 U.S. Code Cong. & Ad. News, 90 Stat. 2641 (October 19, 1976), which restored pre-*Alyeska* law to "cases arising under our civil rights laws, a category of cases in which attorney's fees have been traditionally regarded as appropriate. It remedies gaps in the language of these civil rights laws by providing the specific authorization required by the Court in *Alyeska*, and makes our civil rights laws consistent." (Sen. Rep. No. 94-1011, 94th Cong., 2d Sess. 4 (1976), accompanying S. 2278 (hereinafter "Senate Report").) (See also *id.* at p. 4) ("This de-

cision [*Alyeska*] and dictum created anomalous gaps in our civil rights laws whereby awards of fees are, according to *Alyeska*, suddenly unavailable in the most fundamental civil rights cases. For instance . . . fees are allowed in a suit under Title II of the 1964 Civil Rights Act . . . but not in suits under 42 U.S.C. § 1983 redressing violations of the Federal Constitution"); 122 Cong. Rec. 12163 (daily ed. October 1, 1976) ("This bill restores to the courts authority which they had exercised for years under the private attorneys general concept." (remarks of Rep. Fish).)

We are not left to speculate whether Congress intended the Act to apply to attorney's fee awards in cases like this one. The Act expressly states that it is application to §1983 actions like the present case.² And the legislative history is crystalline on the point. The House Report accompanying the House version of the same bill states:

"In accordance with applicable decisions of the Supreme Court, the bill is intended to apply to all cases pending on the date of enactment as well as all future cases. *Bradley v. Richmond School Board*, 416 U.S. 696 (1974)." (H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. 4, n.6 (1976).)

(See also 122 Cong. Rec. 17052 (daily ed. September 29, 1976) ("This application is necessary to fill the gap created by the *Alyeska* decision and thus avoid

²The Act provides that it applicable to enforce Section 1979 of the Revised Statutes. That section has been codified in 42 U.S.C. § 1983. (See H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. 4 (1976).)

the inequitable situation of an award of attorneys' fees turning on the date the litigation was commenced." (remarks by Sen. Abourezk)); 122 Cong. Rec. 12155 (daily ed. October 1, 1976) ("[I]t would apply to cases now pending, for the simple reason that if that were not the case, the award of fees would depend on the date that the case is filed. I do not think that is the basis on which a determination is made. To that extent, it is retroactive. Pending cases could receive an award of reasonable fees." (remarks of Rep. Anderson)); *id.* at 12160 (remarks of Rep. Drinan).)

As if this were not enough, the Senate Report cited the award in this very case as an example of the fee awards which it approved and which it intended to authorize in the Act. (Senate Report, *supra*, pp. 4, n.3, 6.)

Under these circumstances, no useful purpose would be served in requiring a remand to the district court to decide the impact of the Act on the fee awarded to the appellees. The attorney's fee awarded by the district court was valid when it was made, and it was revalidated by the Act.³ (*Cf. Lytle v. Commissioner of Election* (4th Cir. 1976) 541 F.2d 421.)

AFFIRMED.

³The Senate Report, *supra*, notes that the district court's opinion in this case provides the standards by which fees should be awarded under the Act. (See Senate Report, p. 6 ("It is intended that the amount of fees awarded under S. 2278 be governed by the same standards which prevail in other types of complex Federal litigation The appropriate standards . . . are correctly applied in such cases as *Stanford Daily v. Zurcher*, 64 F.R.D. 680 (N.D. Cal. 1974)").)

Appendix B

United States Court of Appeals
For the Ninth Circuit

No. 74-3212

The Stanford Daily, et al.,	Plaintiffs-Appellees,
vs.	
James Zurcher, et al.,	Defendants-Appellants.

[Filed Mar. 28, 1977]

ORDER

Before: HUFSTEDLER and GOODWIN, Circuit Judges,
and EAST,* District Judge

The panel as constituted in the above case has voted to deny the petitions for rehearing and to reject the suggestions for a rehearing en banc.

The full court has been advised of the suggestions for an en banc hearing, and no judge of the court has requested a vote on the suggestions for rehearing en banc. Fed. R. App. P. 35(b).

The petitions for rehearing are denied and the suggestions for a rehearing en banc are rejected.

*Honorable William G. East, Senior United States District Judge, District of Oregon, sitting by designation.

Appendix C

In the United States District Court
Northern District of California

No. C-71 912 RFP

The Stanford Daily, Felicity A. Barringer,
Fred Mann, Edward H. Kohn, Richard
Lee Greathouse, Robert Litterman, Hall
Daily and Steven G. Ungar,
Plaintiffs,

vs.

James Zurcher, individually and as Chief of
Police of the City of Palo Alto, County of
Santa Clara, State of California, James
Bonander, Paul Deisinger, Donald Martin,
and Richard Peardon, all individually and
as Police Officers of the City of Palo Alto,
County of Santa Clara, State of California,
Louis P. Bergna, individually and as
District Attorney for the County of Santa
Clara, State of California, Craig Brown,
individually and as Deputy District Attorney
for the County of Santa Clara, State
of California, J. Barton Phelps, individually
and as Judge of the Municipal Court
of the Palo Alto-Mountain View Judicial
District, Santa Clara County, State of California,

Defendants.

[Filed Oct. 5, 1972]

MEMORANDUM AND ORDER

This is an action pursuant to 42 U.S.C. § 1983 to declare illegal and unconstitutional a search on April 12, 1971 of the offices of the Stanford Daily, the primary newspaper on the Stanford University campus. In addition to declaratory relief plaintiffs, the Stanford Daily and various members of its staff further pray for an injunction against defendants, various state officials restraining them and anyone acting under their direction

"... from seeking the issuance of, issuing, or executing any warrant to search the office of THE STANFORD DAILY, or in the office or residence of any of its staff members for any photographs, negatives, films, reporters' notes, documents or any other material, whether published or unpublished, taken, received, developed or maintained in the course of efforts to gather news, by any person who is a staff member of THE STANFORD DAILY."

Jurisdiction is founded on 28 U.S.C. § 1343(d).

Defendants, in their answer to the complaint contend that the April 12 search was lawful in all respects. In addition defendants Bergna and Brown, District Attorney and a deputy district attorney for Santa Clara County, respectively state as follows:

"... defendant Bergna, in his official capacity, and other persons in his office, including defendant Brown, in their official capacity, and that defendant [magistrate] in his official capacity, will participate in the seeking of a search warrant and in the issuance of the same, in good

faith and in accordance with the applicable provisions of the laws of the State of California, whenever there is reasonable cause to believe that there exists property or things to be seized which consist of any item or constitute any evidence which tends to show a felony has been committed, or tends to show that a particular person has committed a felony; . . ."

(Paragraph 9 of Answer for defendants Phelps, Bergna, and Brown).

The plaintiffs have moved for summary judgment requesting the relief prayed for in the complaint. For purposes of that motion presently before the Court the facts are not in dispute.¹

On Friday, April 9, 1971, members of the Palo Alto Police Department, as well as the Santa Clara County Sheriff's Department, were called to the Stanford University Hospital to remove a large group of demonstrators. After several futile attempts to have the demonstrators leave peacefully, the police forced their way through the barricaded offices held by the demonstrators. While many of the police entered through a set of doors on the *west* side, the demonstrators apparently charged nine officers stationed on the *east* side. All nine officers were injured, some seriously, and the hospital area was severely damaged. Some furniture and partitions were destroyed, and telephones were ripped out of the walls.

¹Through stipulation of the parties this motion for summary judgment does not include the defendant Municipal Judge.

Most of the photographers, reporters, and bystanders were located at the *west* end, so that only two of the demonstrators who assaulted the police could be identified.

On Sunday, April 11, 1971, photographs appeared in a special edition of the Stanford Daily, which indicated that photographers connected with the Daily had been at the east end of the hospital during the incident in question.

On Monday, April 12, 1971, based upon the affidavit of Officer Richard Peardon of the Palo Alto Police Department, Deputy District Attorney Craig Brown of the Santa Clara County District Attorney's office, obtained a warrant to "make immediate search" of the premises of the Stanford Daily for:

- 1) Negatives of films taken at Stanford University Hospital on the evening of April 9, 1971, showing the Sit-In at the Hospital and following events.
- 2) The film used while taking pictures at Stanford University Hospital on April 9, 1971, showing the Sit-In and following events.
- 3) Any pictures which display the events and occurrences at Stanford University Hospital on the evening of April 9, 1971.

(Exhibit A of the complaint). Defendants have submitted no affidavits, nor have they asserted, that any member of the Stanford Daily was suspected of any unlawful participation in the April 9th incident.

The search warrant was executed at approximately 5:45 P.M. that same day by four members of the

Palo Alto Police Department. (A member of the Stanford University Police Force accompanied them but did not participate in the search). Three of the officers conducted the search, which lasted approximately fifteen minutes.

The search was quite thorough. The officers examined filing cabinets, baskets, and unlocked desk drawers, in executing the warrant. (See affidavits of Officers Deisinger, Martin, and Bonander). According to the plaintiffs' affidavits the desks contained, and the officers were in a position to see notes taken by reporters in the course of interviews which contained information given in confidence and on the understanding that the name of the source would not be disclosed. (See affidavit of Fred Mann at paragraph 25; affidavit of Don Tollefson at paragraph 6.) The plaintiffs assert that the officers saw, scanned or read business and personal correspondence of the *Daily* and members of its staff. (See p. 2 of plaintiff's brief.) The defendants say that even though the photographs were mixed among various notes and letters, they did not read or even scan the materials. As far as the materials described in the search warrant were concerned, the officers apparently found only the photographs that had been published on April 11th, and no materials were removed from the offices.

It should also be pointed out that a check of the Santa Clara County Clerk's records shows that the Santa Clara County Grand Jury—a body before which a subpoena duces tecum is returnable—met on

Monday, April 12, 1971, at 7:30 P.M., two hours after the warrant executed. (Actually, the records reveal that the Grand Jury met at 6:00 o'clock P.M. to discuss administrative matters.)

The basic question in this case is whether third parties—those not suspected of a crime—are entitled to the same, if not greater, protection under the Fourth Amendment than those suspected of a crime. More specifically, are law enforcement agencies required to explore the subpoena duces tecum alternative before obtaining a search warrant against third parties for materials in their possession? For the reasons set forth below the Court holds that third parties are entitled to greater protection, particularly when First Amendment interests are involved. It is the Court's belief that unless the Magistrate has before him a sworn affidavit establishing proper cause to believe that the materials in question will be destroyed, or that a subpoena duces tecum is otherwise "impractical", a search of a third party for materials in his possession is unreasonable per se, and therefor violative of the Fourth Amendment.

I

At the outset, it should be noted that very few cases discuss Fourth Amendment protection of third parties, as distinguished from known suspects, and neither the Court nor the parties have come across any case which discusses the problem of when law enforcement agencies must use a subpoena duces tecum rather than a search warrant. Discussion of

third party searches in the case law is confined almost exclusively to the problem of standing to challenge the legality of the search. See, e.g., *Alderman v. United States*, 394 U.S. 164 (1969). To be sure, searches and seizures against third parties have taken place, but their relative infrequency is perhaps best reflected in the paucity of cases wherein the third party has himself challenged the search. One can offer several explanations as to why there are no cases directly on point here, but no doubt the basic reason is that investigative agencies of government have utilized the subpoena duces tecum to achieve the same end: the examination of certain materials.

On the Fourth Amendment rights of third parties generally, plaintiffs cite three cases dealing with warrantless searches of third parties; *Newberry v. Carpenter*, 107 Mich. 567, 65 N.W. 530 (1895); *Owens v. Way*, 82 S.E. 132 (Ga. Sup. Ct. 1914); *Commodity Mfg. Co. v. Moore*, 198 N.Y.S. 45 (1923). Although *Newberry* could be read to permit a third party search with a warrant, *Owens* and *Commodity* both indicate that a search of a third party even with a warrant will not satisfy the requirements of the Fourth Amendment. In *Owens v. Way*, the police arrested one Edwards for the illegal sale of intoxicating liquors, and simultaneously seized a locked safe which belonged to Way, "on the ground that the safe, if open, would show that it contained intoxicating liquors which [the police] searched to use as evidence in the trial of Edwards." 82 S.E., at 133.

In holding that the seizure was illegal the Supreme Court of Georgia declared:

"[T]he power of an arresting officer to take the property of the defendant, to be used as evidence of the crime charged against him in the warrant, is quite different from the taking of the property of third persons by virtue of no other process save that of the warrant against the accused. The constitutional protection against unreasonable seizure of property would go for naught, if it should be conceded that an arresting officer may arbitrarily possess himself of the property of a third person, taken from the place of business of such third person, solely upon the ground that it may be used as evidence against the defendant in the warrant. We find no authority which extends the power of an arresting officer so far. And, indeed, if one with a warrant for A., charging him with crime, may go into the house of B. and take therefrom property belonging to B., without other authority than that it may be used as evidence on the trial of A., *then the constitutional guaranty against unreasonable seizures would be mere idle words.*" (emphasis added)

82 S.E., at 133.

In *Commodity Mfg.*, which involved a motion to compel the return of books, papers, and documents seized from a third party, the N.Y. Supreme Court stated:

"No case has been cited where the court has gone so far as to say that property, not an instrument of a crime, but only evidence of its

commission, and which was the property of some one besides the defendant, could be seized either under a search warrant or as an incident of the arrest of defendant.

"I can well believe that property used in the commission of a crime, even though belonging to a third party, might properly be seized, and also that property not used in the commission of the crime, but containing evidence of the commission of the crime, might properly be seized, where it is the property of the person accused; but to sanction the seizure of the property of innocent persons, or persons not accused, not used in the commission of the crime, but merely because they contained evidence of the crime, would open the door to grave abuse of invasion of property rights."

198 N.Y.S. at 47.

In support of the proposition that law enforcement agencies must first show that a subpoena duces tecum is impractical before a search warrant can issue against a third-party, plaintiffs cite *Bacon v. United States*, 449 F.2d 933 (9th Cir. 1971). In *Bacon* the Ninth Circuit held that an arrest warrant for a material witness cannot issue unless the judicial officer has by the facts and circumstances as presented to him "probable cause to believe that it may become impracticable to secure his presence by subpoena." 449 F.2d at 943. Plaintiffs argue by analogy that if one not suspected of a crime cannot be *arrested* unless there is a showing that subpoena

is impracticable,² one not suspected of a crime cannot be searched unless there is a showing that a subpoena duces tecum is impracticable.

Defendants attempt to distinguish *Bacon* on two grounds. Defendants first emphasize that *Bacon* was based on the statutory grounds of 18 U.S.C. § 3149 and Rule 46(b) of the Federal Rules of Criminal Procedure, not the Fourth Amendment, and that Rule 46(b) and § 3149 go further in protecting the individual than the Fourth Amendment requires.³

²Obviously a subpoena was *not* impractical. First, this was a search of a newspaper office, and, as discussed above, a search warrant against a newspaper can issue only in very rare circumstances. Second, the Grand Jury—a body before which a subpoena duces tecum is returnable—convened less than two hours after the search took place. Third, there was no hint whatsoever that the sought after materials would be destroyed or removed from the jurisdiction.

³Federal Rules of Criminal Procedure Rule 46(b) reads:

46(b) Bail for Witness. If it appears by affidavit that the testimony of a person is material in any criminal proceeding and if it is shown that it may become impracticable to secure his presence by subpoena, the court or commissioner may require him to give bail for his appearance as a witness, in an amount fixed by the court or commissioner. If the person fails to give bail the court or commissioner may commit him to the custody of the marshal pending final disposition of the proceeding in which the testimony is needed, may order his release if he has been detained for an unreasonable length of time and may modify at any time the requirement as to bail.

18 U.S.C. § 3149 reads:

§ 3149. Release of material witnesses

If it appears by affidavit that the testimony of a person is material in any criminal proceeding, and if it is shown that it may become impracticable to secure his presence by subpoena, a judicial officer shall impose conditions of release pursuant to section 3146: No material witness shall be detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition, and further detention is not necessary to prevent a failure of justice. Re-

(Defendants' Memorandum at page 13). Defendants seem to forget that the courts read the Federal Rules of Criminal Procedure as implementing Fourth Amendment protections, and a rather strong presumption exists that the procedures mentioned in the Federal Rules are required by the Fourth Amendment. See *Giordenello v. United States*, 357 U.S. 480, 485 (1958). *Jones v. United States*, 357 U.S. 493 (1958). Moreover, defendants seem to be arguing that Rule 46(b) and § 3149 are so generous as to afford a citizen *more* protection than is required by the Fourth Amendment.⁴ This argument suggests that the Fourth Amendment permits the arrest of a material witness without a showing that a subpoena is impracticable. To state the proposition is to compel its rejection.

Second, defendants try to argue that even if the Fourth Amendment does require a showing that a subpoena is impracticable before a material witness can be *arrested*, no such requirement should apply to

lease may be delayed for a reasonable period of time until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure.

Added Pub.L. 89-465, § 3(a), June 22, 1966, 80 Stat. 216.

⁴Defendants totally misread *Bacon* when they say that "The Court of Appeals *rejected* the contention that the use of a subpoena was constitutionally required." The Ninth Circuit did not even remotely consider this question. The Court did mention, without ruling, the issue that Rule 46(b) and § 3149 may not afford the protections required by the Fourth Amendment; that is, the Fourth Amendment might require *more* than is showing that a subpoena is impracticable before a material witness can be arrested. 449 F.2d at 941. However, the Court, understandably, enough did not even mention the issue of whether Rule 46(b) and § 3149 were so generous as to afford a citizen *more* protection than is required by the Fourth Amendment.

seizures. But historically the right against unlawful seizures has if anything been *more* protected, not less protected, than the right against unlawful arrests. See Kaplan, "Search and Seizure: a No-Man's Land in Criminal Law", 49 Calif. L.Rev. 474 (1961); Orfield, "Warrant of Arrest in Summons upon Complaint in Federal Criminal Procedure", 27 U. Cine. L.Rev. 1 (1958).

Bacon, then, would seem to compel the rule that no search warrant against a third party can issue unless the state makes a showing that a subpoena is impractical.

Defendants rely on *Warden v. Hayden*, 387 U.S. 294 (1967), for their proposition that third parties should be treated no differently than suspects. *Warden v. Hayden* reversed a series of cases that prohibits the use of warrants to seize "mere evidence".⁵ The focus in *Warden*, however, was on *what* may be seized, rather than *who* may be made the subject of a warrant. The Court made no mention of any application or exceptions to third parties.

Actually, a close reading of *Warden v. Hayden* indicates that the Court was considering only suspects of a crime when it struck down the "mere evidence" rule. For example, the basis of the opinion seems to be that the exclusionary rule adequately protects Fourth Amendment rights and thus by allowing

⁵*Gouled v. United States*, 255 U.S. 298 (1921); *Boyd v. United States*, 116 U.S. 616 (1886).

searches for "mere evidence" would not seriously jeopardize rights of privacy.

The remedy of suppression, moreover, which made possible protection of privacy from unreasonable searches without regard to proof of a superior property interest, likewise provides the procedural device necessary for allowing otherwise permissible searches and seizures conducted solely to obtain evidence of crime.

387 U.S. at 307.

This heavy reliance on the exclusionary rule certainly suggests that the Supreme Court was considering only those suspected of a crime when it struck down the "mere evidence" rule. Note also the discussion, particularly by Mr. Justice Douglas in dissent, of the *Fifth* Amendment consideration. Discussions of self incrimination would seem rather irrelevant if the Court was considering those truly not suspected of committing a crime.

II

It should be apparent that means less drastic than a search warrant do exist for obtaining materials in possession of a third party. A subpoena duces tecum, obviously, is much less intrusive than a search warrant: the police do not go rummaging through one's home, office, or desk if armed only with a subpoena. And, perhaps equally important, there is no opportunity to challenge the search warrant prior to the intrusion, whereas one can always move to quash the subpoena before producing the sought-after mate-

rials. This procedural difference is important. Mistakes in the issuance of a warrant or subpoena have occurred; motions to suppress and motions to quash are not uncommon. In view of the differences in degree of intrusion and opportunity to challenge possible mistakes, the subpoena should always be preferred to a search warrant, for non-suspects.

For a variety of reasons the court believes that in all but a few instances a subpoena duces tecum is the proper—and required—method of obtaining material from a third party.

First, the tremendous value our society places on privacy, indicates that intrusions should take place only when “necessary”. The history and importance of the Fourth Amendment have been well-documented, and there is no need for further elaboration in this opinion. See, *e.g.*, *Mapp v. Ohio*, 367 U.S. 643 (1961); *Weeks v. United States*, 232 U.S. 383 (1914). The intrusion from the execution of a warrant—a paramount concern of the Founding Fathers—is simply “unnecessary” in most situations involving non-suspects, since a “less drastic means” exists to achieve the same end.

Second, as a historical matter the notion of search warrants has involved only those suspected of a crime. See the discussion in *Henry v. United States*, 361 U.S. 98, 100 (1959), and *Kaplan*, *op. cit.*, at 475-477.

“It is only fair to observe that the real evil aimed at by the Fourth Amendment is the search itself, that invasion of a man’s privacy which

consists in rummaging about among his effects to secure evidence against him.”

United States v. Poller, 43 F.2d 911, 914 (2nd Cir. 1930) (opinion of Learned Hand, J.)

Third, if law enforcement agencies were not required to first explore the subpoena alternative in third-party situations, a third-party would receive no meaningful protection against an unlawful search, and there would be the rather incongruous result that one suspected of a crime would receive *greater* protection against unlawful searches than a third party. The chief remedy and protection against an unlawful search for one suspected of a crime is the suppression of the illegally obtained evidence. See *Mapp v. Ohio*, 367 U.S. 643 (1961); *Elkins v. United States*, 364 U.S. 206 (1960); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920); *Weeks v. United States*, 232 U.S. 383 (1914). See also *People v. Cahan*, 44 Cal. 2d 434 (1955). Although the “exclusionary rule” may provide some vindication for a suspect whose Fourth Amendment rights have been violated, its basic purpose is to deter law enforcement from conducting unlawful searches “. . . to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.” *Elkins v. United States*, *supra*, at 217. No other meaningful “remedy” or “protection” exists for the victim of an unlawful search:

“The experience of California that . . . other remedies have been worthless and futile is buttressed by the experience of other States. The

obvious futility of relegating the Fourth Amendment to the protection of other remedies has, moreover, been recognized by this Court . . .”.

Mapp v. Ohio, *supra*, at 652.

The Court in *Mapp* stated that without the exclusionary rule,

“ . . . the assurance against unreasonable federal searches and seizures would be ‘a form of words,’ valueless and undeserving of mention in a perpetual charter of inestimable human liberties, so too, without that rule the freedom from state invasions of privacy would be so ephemeral and so neatly severed from its conceptual nexus with the freedom from all brutish means of coercing evidence as not to merit this Court’s high regard as a freedom ‘implicit in the concept of ordered liberty’.”

367 U.S. at 655.

Nor does it matter that the police have bothered to obtain a warrant if it is defective; the exclusionary rule applies to searches authorized by defective warrants as well. See, *e.g.*, *Aguilar v. Texas*, 378 U.S. 108 (1964), *United States v. Anderson*, 453 F.2d 174 (9th Cir. 1971).

A third-party, however, does not have the protection or deterrent of the exclusionary rule, for by definition he is not about to be tried for a crime. Unlike one suspected of a crime the third party has no meaningful remedy or protection against an unlawful search, with or without a warrant, and an additional safeguard is necessary to assure that his

Fourth Amendment rights are not trampled. That protection is the obligation of law enforcement to use a subpoena duces tecum unless it is shown, through sworn affidavits,⁶ that it is impractical to do so.

Nor should it matter that the law enforcement agencies did in fact go to the magistrate, or that probable cause did in fact exist to believe that a subpoena was impractical unless such probable cause was established by sworn statements to the magistrate. Courts do not excuse searches with defective warrants even if probable cause could have been demonstrated before the magistrate, but in fact was not. See, *e.g.*, *Chapman v. United States*, 365 U.S. 610 (1961), *Aguilar*, *supra*. See also *Anderson*, *supra*. Procedural safeguards *must* be followed.

Thus, in order to assure that third-parties will have some meaningful protection against unlawful searches—protection that suspects now receive with the exclusionary rule—the subpoena duces tecum alternative should be required.⁷

A fourth factor supporting the requirement for the subpoena duces tecum alternative unless “impractical” is the *Bacon* case, discussed above. *Bacon v. United States*, 449 F.2d 933 (9th Cir. 1971). Rule

⁶See *U.S. v. Anderson*, *supra*.

⁷Obviously the additional procedural requirement of exploring the subpoena alternative is not, for the third party, a total deterrent to Fourth Amendment violations, but neither is the exclusionary rule a “total deterrent” for the suspect. Both procedures, however, do afford *some* meaningful protection.

46(b) of the Federal Rules of Criminal Procedure and 18 U.S.C. § 1349 state quite clearly that a material witness cannot be arrested or detained unless a subpoena is impractical.⁸ Although Rule 46(b) and § 1349 are both silent on the requirement of probable cause, the Ninth Circuit, citing *Terry v. Ohio*, 392 U.S. 1 (1968), held that the Fourth Amendment requires a showing of probable cause to believe that a subpoena is impractical.⁹ As plaintiffs have argued, if one not suspected of a crime cannot be arrested unless there is probable cause to believe that a subpoena is impractical, one not suspected of a crime cannot be searched unless there is probable cause to believe that a subpoena duces tecum is impractical.¹⁰

All of these factors compel the following rule: law enforcement agencies cannot obtain a warrant to conduct a third-party search unless the magistrate has probable cause to believe that a subpoena duces tecum is impractical. Any evidence that a subpoena is impractical must be presented in a sworn affidavit if the magistrate is to rely on it. *United States v. Anderson*, 453 F.2d 174 (9th Cir. 1971). In other words, even if facts and circumstances do exist that establish probable cause to believe a subpoena is im-

⁸In fact a majority of state courts that have considered the question have held that in the absence of statutory authority there is no common-law power to detain witness at all before actual disobedience of a subpoena. See Carlson, "Jailing the Innocent: The Plight of the Material Witness," 55 Iowa L.Rev.1, 20-25 (1969).

⁹449 F.2d at 942.

¹⁰On the point that searches historically have been more protected than arrests, see generally, *Kaplan, op cit.*

practical, they must be set forth in a sworn affidavit or else the warrant is defective.

Obviously, one can envision numerous situations where a subpoena might or might not be "impractical", and the Court will not attempt to consider them all specifically at this time. Several factors, however, should be emphasized for consideration by the magistrate. First, the mere failure to respond to a subpoena duces tecum should not, without more, be grounds for issuing a search warrant. The normal remedy for failure to respond to a subpoena is a contempt proceeding. See Rule 17(g) of Fed. Rules of Crim. Proc. and Rule 45(f) of the Fed. Rules of Civ. Proc. See, generally, Wright, *Federal Practice and Procedure*, § 279. Thus, even if the subpoena has been disregarded, it is questionable if a magistrate should still issue a warrant.¹¹

Second, a subpoena can be impractical if the destruction of evidence is threatened. Although Cal. Pen. Code § 135 makes the destruction of evidence a crime, the criminal statute alone may not provide a sufficient deterrent if the destruction of materials is truly imminent. A court certainly possesses the power to issue a restraining order where it is presented with evidence that the materials are about to be taken from the jurisdiction or their destruction is imminent. See *Demich, Inc. v. Ferdon*, 426 F.2d 643 (9th Cir. 1970), *vacated and remanded on other grounds*,

¹¹*Mancusi v. DeForte*, 392 U.S. 364 (1968) unfortunately does not settle whether (or when) a search warrant can issue if a subpoena is disregarded.

401 U.S. 990 (1971); *Bethview Amusement Corp. v. Cahn*, 416 F.2d 410 (2nd Cir. 1969). Only if it appears that the materials will be destroyed or removed from the jurisdiction despite the restraining order, or that there simply is not time to obtain a suitable order, should a magistrate find probable cause to believe that a subpoena is impractical.

Another important factor the magistrate should consider is whether First Amendment interests are involved. Defendants, citing the United States Supreme Court case *Branzburg v. Hayes, et al.*, 70-85, and companion cases *In the Matter of Paul Pappas*, 70-94, and *United States v. Carl Caldwell*, 70-57, seem to argue that newsgathering is not protected by the First Amendment, and that newspapers, reporters, and photographers therefore have no greater Fourth Amendment protections than other citizens. (Defendants' Memorandum at p. 7). Both the premise and conclusion are incorrect, however. *Branzburg* clearly states that the First Amendment protects newspapers in their newsgathering functions:

"We do not question the significance of free speech, press or assembly to the country's welfare. Nor is it suggested that newsgathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated." (Slip Opinion at p. 15)

"Finally, as we have earlier indicated, news gathering is not without its First Amendment protections, and grand jury investigations if instituted or conducted other than in good faith, would pose

wholly different issues for resolution under the First Amendment.

Official harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification. Grand juries are subject to judicial control and subpoenas to motions to quash. We do not expect Courts will forget that grand juries must operate within the limits of the First Amendment as well as the Fifth."

(Slip Opinion, at p. 42)

Mr. Justice Powell, whose vote was necessary to the Court's judgment, emphasized in his concurrence the "limited nature of the Court's holding".

"The Court does not hold that newsmen, subpoenaed to testify before a grand jury, are without constitutional rights with respect to the gathering of news or in safe-guarding their sources. Certainly, we do not hold, as suggested in the dissenting opinion, that state and federal authorities are free to "annex" the news media as 'an investigative arm of government'. The solicitude repeatedly shown by this Court for First Amendment freedoms should be sufficient assurance against any such effort, even if one seriously believed that the media—properly free and and untrammelled in the fullest sense of the terms—were not able to protect themselves. . . .

Indeed, if the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relation-

ships without a legitimate need of law enforcement, he will have access to the Court on a motion to quash and an appropriate protective order may be entered. The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interest on a case-by-case basis accords with the tried and traditional way of adjudicating such questions." (Slip Opinion, at p. 1)

While conceding that some First Amendment harms might take place if reporters can be compelled to testify before a grand jury, the Court believed that the societal interest in unimpeded grand jury investigations is a "compelling state interest", sufficient to outweigh the First Amendment harms. (Slip Opinion, at p. 24) The majority emphasized repeatedly that the basis of its decision was this "compelling state interest" in grand jury investigations.

The other aspect of defendants' argument—that newspapers, reporters and photographers have no greater Fourth Amendment protection than other citizens—is also without merit. The First Amendment is *not* superfluous. Numerous cases have held that the First Amendment "modifies" the Fourth Amendment to the extent that extra protections may be required when First Amendment interests are involved. See, e.g., *A Quantity of Books v. Kansas*, 378 U.S. 205

(1964); *Marcus v. Search Warrant*, 367 U.S. 717 (1961); *Demich, Inc. v. Ferdon*, 426 F.2d 643 (9th Cir. 1960); *vacated and remanded on other grounds*, 401 U.S. 990 (1971); *Bethview Amusement Corp. v. Cahn*, 416 F.2d 410 (2nd Cir. 1969), *cert. denied*, 397 U.S. 920 (1970). See also *NAACP v. Alabama*, 357 U.S. 449 (1958). *Branzburg* does not purport to overrule these cases; it fails to even mention them. In short, one cannot logically read *Branzburg* to relegate the First Amendment to redundancy.

The First Amendment infringements with searches of newspapers are quite serious. The majority in *Branzburg* was troubled by the uncertainty as to "how often and to what extent informers are actually deterred from furnishing information when newsmen are forced to testify before a grand jury." (Slip Opinion, at p. 27) The threat to the press's newsgathering ability, however, is much more imposing with a search warrant than with a subpoena.

1) A reporter or photographer responding to a subpoena will bring to the grand jury hearing only those materials mentioned in the subpoena; the police officers executing a warrant, however, will be in a position to see notes and photographs not even mentioned in the warrant. As is apparent from the affidavits, newspaper offices are much more disorganized than, say, the average law office; a search for particular photographs or notes will mean rummaging through virtually all the drawers and cabinets in the office. The "indiscriminate nature" of such a search

renders vulnerable¹² all confidential materials, whether or not identified in the warrant, and the concomitant threat to the gathering of news—which frequently depends on confidential relationships¹³—is staggering.

2) Unlike the issuance of a subpoena or subpoena duces tecum, the *ex parte* issuance and execution of a search warrant deprives the newspaper and newsman of that “judicial control” thought so essential in *Branzburg*. (See majority opinion at Slip Opinion, p. 42, and concurrence of Powell, J. at p. 2).

3) There is also a possibility that police searches will jeopardize a newspaper’s credibility and create a risk of self-censorship. (See Affidavits of Walter Cronkite, Frank P. Haven, Gordon Manning, and Gene Roberts.)

Because a search presents an overwhelming threat to the press’s ability to gather and disseminate the news, and because “less drastic means” exist to obtain the same information,¹⁴ third-party searches of news-

¹²It is irrelevant that the police are instructed not to “read” or “look closely” at photographs or notes not mentioned on the warrant because a) it is difficult to imagine how a policeman searching for a photograph or set of notes will not “read” or “look closely” at items not mentioned in the warrant and b) the major harm to the press comes with the public knowledge that the police will be in a position to see confidential material.

¹³See *e.g.*, *Blase Press Subpoenas: An Empirical and Legal Analysis* (1972).

¹⁴See *Branzburg*, *supra*. On the “less drastic means” policies in the First Amendment area, see *Shelton v. Tucker*, 364 U.S. 479 (1960); *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293 (1961); Note, *Less Drastic Means and the First Amendment*, 78 Yale L.J. 464 (1969).

paper office¹⁵ are impermissible in all but a very few situations. A search warrant should be permitted only in the rare circumstance where there is a *clear showing* that 1) important materials will be destroyed or removed from the jurisdiction; *and* 2) a restraining order would be futile. To stop short of this standard would be to sneer at all the First Amendment has come to represent in our society.

Turning now to the April 12, 1971 search, it should be apparent that the search was unlawful. a) It was a third-party search; defendants, although given ample opportunity, have submitted no affidavits showing that any member of the Daily organization was suspected of unlawful participation in the April 9 fracas at the Stanford University Hospital; b) No affidavits were submitted to the magistrate demonstrating probable cause to believe that a subpoena was impractical.¹⁶

Defendants, however, contend that even if the April 12, 1971 search was unlawful the court cannot consider the summary judgment question because of two procedural obstacles: 1) the plaintiffs lack standing

¹⁵The Court believes it is unnecessary to consider the situation when someone connected with the newspaper office is suspected of a crime.

¹⁶Defendant Craig Brown has submitted to the Court an affidavit that attempts to show why, in his opinion, a subpoena was “impractical”. The affidavit, based mainly on hearsay, does not establish probable cause to believe that a search warrant was impractical. Moreover, even if the affidavit did establish probable cause, it was not submitted to the magistrate; any evidence that probable cause existed to conclude that a subpoena was impractical must be within the “four corners of the affidavits” before the magistrate. See *United States v. Anderson*, *supra*.

to question the legality of the search; and 2) the legality of the April 12 search is now a moot question. Clearly all of the plaintiffs have standing to contest the legality of the search. See *Mancusi v. De Forte*, 392 U.S. 364 (1968); *Jones v. United States*, 362 U.S. 257 (1960); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920).

It is also clear that the legality of the April 12 search is not a moot question. Defendants have maintained throughout this entire case that they would search the Daily pursuant to warrant again should the same circumstances arise. (See, *e.g.*, paragraph 9 of answer of defendants Bergna, Brown, and Phelps.) Plaintiffs alleges that the April 12 search and the threat of similar searches in similar circumstances in the future:

"... causes persons participating in meetings, demonstrations and rallies to refuse necessary cooperation to THE STANFORD DAILY reporters and photographers thereby making it impossible for them adequately to cover the events; (2) causes persons to refuse to give confidential information to STANFORD DAILY reporters lest such information be disclosed to the police; 3) causes THE STANFORD DAILY photographer and reporters to engage in self-censorship in order to avoid producing materials which the police may wish to seize; and (4) renders THE STANFORD DAILY unable to maintain notes, files and records, including photographic records, necessary for the fulfillment of THE STANFORD DAILY's journalistic function for fear that possession of certain materials

will cause the police again to search the offices of THE STANFORD DAILY."

The affidavits of the Daily staff clearly document the undermined confidence in the Daily among fellow students as a result of this search and note their own reluctance toward aggressive newsgathering. The continuing effect of the search is undeniable. (See affidavits of Kohn, Lyle, Mann, Tollefson, and Ungar). Plaintiffs have a substantial stake in the judgment of this Court. Moreover, because evidence from third parties not sought to be introduced against the party, is not subject to a motion to suppress, a ruling that the present question is moot would deny any effective review of defendants' unconstitutional action. No such ruling is required here. *Cf. Sibron v. New York*, 392 U.S. 40 (1968).

No factual issues remain with regard to the April 12 search. It was a search of a third-party, and defendants failed to establish probable cause to believe that a subpoena was impractical. Consequently, plaintiffs' motion for a declaratory judgment that the April 12 search at the Stanford Daily offices was illegal is granted.

Plaintiffs have also moved for an injunction against similar future searches by defendants. The defendants in this case are the District Attorney of Santa Clara County, an assistant District Attorney for Santa Clara County, the Chief of Police for the City of Palo Alto, and four members of the Palo Alto Police Force. All are respected members of the com-

munity, and each plays an important role in the law enforcement process. There is no reason to believe that, after the declaratory judgment concerning the April 12 incident, defendants will conduct such a search against the plaintiffs in the future. The court anticipates that this decision will be honored and that an injunction is unnecessary. In the unlikely event that defendants do conduct such a search against plaintiffs in the future, plaintiffs are free to renew their motion for a permanent injunction.

Dated, October 5, 1972

/s/ Robert F. Peckham
United States District Judge

Appendix D

In the United States District Court
Northern District of California

No. C-71-912 RFP

The Stanford Daily, et al.,	Plaintiffs,
vs.	
James Zurcher, individually and as Chief of Police of the City of Palo Alto, County of Santa Clara, State of California, et al.,	Defendants.

[Filed Aug. 10, 1973]

MEMORANDUM AND ORDER

This lawsuit had its genesis when several members of the Palo Alto Police Department, acting pursuant to a warrant, engaged in a search of the offices of the *Stanford Daily*, Stanford University's campus newspaper. Defendants are members of the Palo Alto Police Department, the District Attorney for Santa Clara County, and one of his deputies, each named individually and in his official capacity. The plaintiff is the *Stanford Daily*, an unincorporated association,¹ and its student editors.

¹See Fed. Rule Civ. Pro., Rule 17(b); Cal. Code Civ. Pro. §388(a) (West 1973).

Defendants, throughout this litigation, have maintained that the search of the *Daily* office, although no one at the *Daily* was suspected of committing a crime, was an entirely legal act, and they further maintain that they would conduct such a search again under similar circumstances.

I.

Pursuant to 42 U.S.C. §1983 (1970) plaintiffs brought suit in this court seeking declaratory relief and an injunction. On October 5, 1972, this court ruled, as to those not suspected of a crime, third parties, that the warrant was insufficient to comply with the fourth amendment when it appears that there was available to law enforcement personnel an alternative course of conduct which could achieve the same end in a manner much less intrusive upon the concerns voiced in the fourth amendment.² In other words, the court ruled that the law enforcement personnel must explore the *subpoena duces tecum* alternative before obtaining and executing a warrant for the search of those not suspected of criminal activity.³ During the pendency of the litigation, this court was surprised at the dearth of litigation on the question of the fourth amendment rights of third parties. *Id.* at 127. One possible explanation was that investigative agencies normally use the subpoena alternative

²Memorandum and Order reported 353 F.Supp. 124 (N.D. Cal. 1972); Note, 86 HARV. L. REV. 1317.

³The court granted declaratory relief only but left upon the possibility that an injunction might issue if plaintiffs presented to the court facts which would indicate that declaratory relief alone was not sufficient to protect plaintiffs' rights as declared.

to achieve their objective in examining materials of third parties.

Another possible explanation is that a defense to an action for monetary damages under 42 U.S.C. §1983 brought against a law enforcement officer is that the officer acted in good faith. *Pierson v. Ray*, 386 U.S. 547 (1967).⁴ If a party chooses to vindicate his fourth amendment rights which have allegedly been violated by a law enforcement officer, albeit in good faith, he is relegated to declaratory and injunctive relief.⁵ The aggrieved person must be prepared to make the kind of showing which would warrant equitable relief. And lastly, for no pecuniary gain, he is required to engage in extensive litigation at considerable cost including attorney's fees, just for the satisfaction of having a court determine that the police violated the Constitution, and possibly obtaining an injunction if he can show that there is a real possibility the violation may reoccur.⁶

It is not surprising that when faced with the costs of interminable litigation against a city and county with relatively unlimited resources measured against the limited satisfaction obtained when and if relief is finally given, many potential plaintiffs are unwil-

⁴See text accompanying note 19, *infra*.

⁵*Cf. Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 408 (1971). See also *Jackson v. Ogilvie*, 426 F.2d 1333 (7th Cir.), *cert. denied* 400 U.S. 833 (1970).

⁶See Note, *The Federal Injunction as a Remedy for Unconstitutional Policy Conduct*, 78 Yale L.J. 143 (1968).

ling to take on the task of "fighting City Hall." At a time when legal costs, particularly attorney's fees are rising, third party rights protected by the fourth amendment, while existing in theory, in practice have no meaningful effect.

This situation may be contrasted to a criminal defendant, who has a relatively adequate remedy by way of a suppression hearing to determine the legality of the search. *See Mapp v. Ohio*, 367 U.S. 643 (1961); *Elkins v. United States*, 364 U.S. 206 (1960). The criminal defendant, unlike the third party, has an extraordinary incentive to vindicate his fourth amendment right to obviate a successful prosecution against him. And if he cannot afford counsel, one will be appointed for him.

The rights expressed in the fourth amendment are in constant tension with expedient law enforcement. *Almeida-Sanchez v. United States*, 41 U.S.L.W. 4970 (June 21, 1973). But it is the job of every citizen to insure that overzealous law enforcement personnel do not compromise the high values placed on privacy in our society. It is important to remember that the fourth amendment protects all the people, and not just those suspected of a crime. It would be a cruel irony if those people who harbored contraband had an adequate incentive to pursue an effective remedy for violations of their fourth amendment rights, while those who engage in entirely legal activity, because of the economic realities of the cost of attorney's fees must allow their constitutional rights to go unvindicated.

The plaintiffs have moved for an award of reasonable attorney's fees. For the reasons which follow, the motion is granted.

II.

It has been the general view in this country, absent statutory direction, that attorney's fees are not ordinarily awardable as a cost of litigation.⁷ In England, the courts have discretion to award a reasonable allowance for attorney's fees since the court was to make the prevailing party whole.⁸

The English rule which awards attorney's fees as costs to the plaintiff or defendant, whoever prevails, also has the effect of promoting settlement. The generally accepted American view is that recourse to litigation is not wrong, and that the party who does not prevail ought not be penalized for his resort to the courts to vindicate his rights.⁹ It is indeed ironic that the very purpose of the general American rule, not to deter litigation, is in many cases having the exact opposite effect. The inability to get attorney's fees directly, or indirectly, through damage awards, has the effect of deterring many potential plaintiffs from seeking redress in the courts. *See Newman v. Piggie*

⁷The American rule was originally adopted when counsel fees were awarded by courts as a fixed sum of money, pursuant to a schedule. In a period of rising prices the attorneys successfully abolished court fixed fees. Goodhart, *Costs*, 38 YALE L. J. 849, 854 (1929); Note, 77 HARV. L. REV. 1135 (1964); Enrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 CALIF. L. REV. 792 (1966).

⁸6 J. Moore, *Federal Practice* 1703.

⁹Note, 77 HARV. L. REV. 1135 (1964). Nor are attorney's fees directly awardable as damages. *Day v. Woodworth*, 13 How. 363 (1851); 6 J. Moore, *Federal Practice* 1704.

Park Enterprises, 390 U.S. 400 (1969) (per curiam).¹⁰ While legal aid offices¹¹ and contingent fee arrangement, where damages would lie,¹² have provided some legal services for those who could not otherwise afford them, there is no doubt that new methods of financing legal services to all levels of society must be explored.¹³ Accordingly many commentators have questioned the continuing vitality of the American rule, and its effect on the delivery of legal services.

¹⁰The Court in *Piggie Park* intimated no view, nor is the legislative history clear as to whether a party who successfully defends an action under Title II of the Civil Rights Act of 1964, §204(a), 42 U.S.C. § 2000a-3 would be a prevailing party. Nor whether if a prevailing party, different factors might guide a court's discretion. See *Northcross v. Memphis Bd. of Ed.*, 41 U.S.L.W. 3635 (June 4, 1973).

¹¹There are approximately 355,000 attorneys licensed to practice in the United States, and only 2,500 work for legal services. Prepaid Legal Services, transcript of proceedings of a national conference held by ABA Special Committee on Prepaid Legal Services held in Washington, D.C., April 27-29, 1972 at 1. See also Brief of National Legal Aid and Defenders Association, *Amicus Curiae* in *La Raza v. Volpe*, 73-1145 (9th Cir., appeal filed Dec. —, 1972).

A former Director of the Office of Economic Opportunity estimates that legal services meet only about 28% of poor people's needs. Testimony of Frank Carlucci, hearings on H.R. 40, H.R. 185, H.R. 357, etc. before the House Committee on Education and Labor, 92 Cong., 1st Sess. pt.e at 1S66-67 (1971).

See J. Falk and S. Polack, *Political Interference with Publicly Funded Lawyer: The CRLA Controversy and the Future of Legal Services*, 24 *Hast. L.Rev.* 599 (1973).

¹²The principles which underlie the contingent fee arrangement may have some bearing in determining what amount constitutes a reasonable attorney's fee where Congress or the courts provide for such an award. See Disciplinary Rule 2-106 of the Code of Professional Responsibility of the American Bar Association.

¹³See McLaughlen, *The Recovery of Attorney's Fees: A New Method of Financing Legal Services*, 40 *Ford. L. Rev.* 761 (1972); See Sen. Rep. 93-146 accompanying S. Res 101, 93rd Cong., 1st Sess. (1973) authorizing a new subcommittee of the Senate Judiciary Committee to inquire into, inter alia, new methods of financing the delivery of legal services.

Many have suggested a liberalization of the strict American rule.¹⁴

III.

To ameliorate the inequities, both Congress and the courts have made inroads into the strict application of the American rule. It is not beyond dispute that federal courts have equitable powers to award attorney's fees in appropriate cases. *Sprague v. Ticonic National Bank*, 307 U.S. 161, 166 (1939). It is also well established that "... in the absence of statutory or contractual authorization, federal courts, in the exercise of their equitable powers, may award attorney's fees when the interest of justice so requires. *Hall v. Cole*, 41 U.S.L.W. 4658, 59 (May 21, 1973); *Mills v. Electric Auto-Lite*, 396 U.S. 375 (1970).

The only question for a district court is then, whether in the exercise of its equitable powers, the interest of justice requires that fees be shifted. There are two parts to this question. First, is this the type of case in which the court has discretion to award attorney's fees as cost? And if so as a matter of the court's discretion, is this an appropriate case?

A. Type of case.

In *Sprague v. Ticonic National Bank*, 307 U.S. 161 (1939) the Court held that attorney's fees can be

¹⁴Ehrenzweig, *supra*, Stoebe, *Counsel Fees Included in Costs: A Logical Development*, 38 *U. COLO. L. REV.* 202 (1966) McLaughlen, *supra*, Kuenzel, *The Attorney's Fee: Why not a Cost of Litigation?* 49, *IOWA L. REV.* 75 (1963) Note, *Attorney's Fees: Where Shall the Ultimate Burden Lie?* 20 *VAN. L. REV.* 1216 (1967); Note, *The Allocation of Attorney's Fees After Mills v. Electric Auto-Lite Co.*, 38 *U. CHI. L. REV.* 316 (1971).

awarded when the judgment results in a "common fund" for the plaintiffs or for the class. In *Mills v. Electric Auto-Lite*, 396 U.S. 375 (1970), the Court approved the award of attorney's fees to shareholders who succeeded in setting aside a corporate merger. The Court extended the scope of the common fund rationale by holding that no pecuniary benefit need be demonstrated. *Id.* at 393. As this court pointed out in *La Raza Unida v. Volpe*, 57 F.R.D. 94 (N.D. Cal. 1972), *Mills* represents both the defensive and affirmative use of the Court's equitable powers. Defensive to prevent unjust enrichment of free riders and affirmative or offensive to promote the effective implementation of the Congressional objective of fair and informed corporate suffrage, *Id.* at 98.

In *Newman v. Piggie Park Enterprises*, 390 U.S. 400 (1968), in interpreting the scope of the reasonable attorney's fee provision under Title II of the Civil Rights Act of 1964, 204(b), 42 U.S.C. § 2000 a-3 (b), the Court found that fees were awardable as costs "not simply to penalize litigants who deliberately advance arguments they know to be untenable but, more broadly, to encourage individuals injured by racial discrimination to seek judicial relief under Title II." In essence, the Court found, in determining Congress's objective, that the general American Rule, not to award attorney's fees as costs, was having the opposite effect from its intent. Far from promoting a judicial determination of rights, at least in the equitable relief area, the policy of not awarding fees was an obstacle to a judicial determination of rights.

Mills and *Piggie Park* touched responsive chords, and the federal judiciary responded in a myriad of decisions indicating that where a plaintiff seeks only equitable relief, that strict application of the American rule no longer makes sense as a policy to promote access to courts. *Hall v. Cole*, 41 U.S.L.W. 4658 (May 21, 1973); *Northercross v. Memphis Board of Ed.*, 41 U.S.L.W. 3635 (June 4, 1973); *Sims v. Amos*, 409 U.S. 936 aff'g. 340 F. Supp. 691 (M.D. Ala. 1972); *Knight v. Auciello*, 453 F.2d 852 (1st Cir. 1973); *McEnteggart v. Cataldo*, 451 F.2d 1109 (1st Cir. 1971); *Gartner v. Soloner*, 384 F.2d 348 (3rd Cir. 1967); *Brewer v. School Bd.*, 456 F.2d 943 (4th Cir. 1972), cert. denied, 92 S.Ct. 1778; *Lee v. Southern Home Sites Corp.*, 444 F.2d 143 (5th Cir. 1971); *Callahan v. Wallace*, 466 F.2d 59 (5th Cir. 1972); *Cooper v. Allen*, 467 F.2d 836 (5th Cir. 1972); *Donahue v. Staunton*, 471 F.2d 475, 482 (7th Cir. 1972); *Yablonski v. United Mine Workers*, 466 F.2d 424 (D.C. Cir. 1972), cert. denied, 40 L.W. 3512 (1973); *La Raza Unida v. Volpe*, 57 F.R.D. 94 (N.D. Cal. 1972); *Johnson v. San Francisco Unified School District*, Civ. No. 70-1331 SAW (N.D. Cal. decided Sept. 12, 1972).

Ross v. Goshi, 351 F. Supp. 949 (D. Haw. 1972); *Jinks v. Mays*, 350 F. Supp. 1037 (N.D. Ga. 1972); *Newman v. Alabama*, 349 F. Supp. 278 (M.D. Ala. 1972); *Wyatt v. Stickney*, 344 F. Supp. 408 (M.D. Ala. 1972); *NAACP v. Allen*, 340 F. Supp. 703 (M.D. Ala. 1972); *Shull v. Columbus Mun. Separate School Dist.*, 338 F. Supp. 1376 (N.D. Miss. 1972); *Local 4076 United Steelworkers v. United Steelworkers*, 338

F. Supp. 1154 (W.D. Pa. 1972); *Moore v. Knowles*, 333 F. Supp. 53 (N.D. Tex. 1971); *Brown v. Ballas*, 331 F. Supp. 1033 (N.D. Tex. 1971); *Hammond v. Housing Authority and Urban Renewal Agency of Lane County*, 328 F.Supp. 587 (D. Ore. 1971); *Lyle v. Teresi*, 327 F. Supp. 683 (D. Minn. 1971).

While various rationales have been given for including attorney's fees as costs, the courts are in essence making a judgment that including attorney's fees as cost is an additional remedy necessary to effectuate the congressional underpinnings of a substantial program.

The equitable federal powers to imply remedies is not new. Act of May 8, 1972, §2, 1 Stat. 276; C. Wright, *Law of Federal Courts*, 257 (2d ed. 1970).¹⁵ As Justice Harlan wrote, concurring in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971):

"Thus, in suits for damages based on violations of federal statutes lacking any express authorization of a damage remedy, this Court has authorized such relief where, in its view, damages are necessary to effectuate the congressional policy underpinning the substantive provisions of the statute. *J.I. Case v. Borak*, 377 U.S. 426 (1964); *Tunstall v. Brotherhood of Locomotive Firemen & Enginemen*, 323 U.S. 210, 213 (1944). *Id.* at 402.

¹⁵*Bell v. Hood*, 327 U.S. 678 (1946); *J. I. Case Co. v. Borak*, 337 U.S. 426 (1947); *Deckert v. Independence Corp.*, 311 U.S. 282 (1940); *Mitchell v. De Mario Jewelry*, 361 U.S. 288 (1960); *Swann v. Board of Ed.*, 402 U.S. 1 (1971).

The Court in *Bivens* held that in order to protect encroachment by federal officers on rights protected by the fourth amendment, it was necessary to imply a particular remedial mechanism, that is, suits for damages.

In *J.I. Case v. Borak*, *supra*, the Court "implied"—from what can only be characterized as an 'exclusively procedural provision' affording access to a federal forum . . . a private cause of action for damages for violation of § 14(a) of the Securities Exchange Act of 1934, 48 Stat. 895, 15 U.S.C. § 78n(a)." *Bivens*, 403 U.S. at 403 n.4. In *Mills*, the Court found that the policies expressed by Congress in the same statute also required that an award of attorney's fees be made because this would "provide an important means of enforcement of the proxy statute." 396 U.S. at 396.

In *Bivens*, after recognizing the inherent equitable power to imply remedies, the late Justice Harlan passed to the question of whether a damages remedy would be appropriate. In reaching the conclusion that implying a damage action is appropriate in the fourth amendment area, he relied on the fact that no other alternative remedy was provided to insure the vindication of the right in question, and that the right ranked sufficiently high on the social scale that it was worthy of protection.¹⁶

¹⁶Congress has by statute recognized that certain classes of rights rank high on the nation's social priorities and have given to plaintiffs the additional remedy of fee shifting. See e.g., 42 U.S.C. § 2000a-3(b) (public accommodations); 42 U.S.C. § 2000(e)-5(k) (equal employment); 42 U.S.C. § 3612(c) (fair housing). See also Education Amendments of 1972 § 718, 41 U.S.L.W. 45

In *Bivens*, Harlan concluded that the fourth amendment area was peculiarly suited for judicial supervision and remedy formulation. *Id.* at 405-410. See *Mapp v. Ohio*, *supra*. See also *Bell v. Hood*, *supra*. To the plaintiffs in *Bivens* the exclusionary rule was irrelevant and injunctive relief was unlikely. Additionally he found that the rights protected by the fourth amendment ranked at least as high on our social value as the rights of stockholders defrauded by misleading proxies. *Bivens*, 403 U.S. at 411. See *J.I. Case v. Borak*, *supra*, giving private damage remedy, and *Mills*, *supra*, awarding attorney's fees as costs thereby insuring that the right of action given in *J.I. Case Co.*, will in fact be brought.

Applying the criteria for the appropriate use of the court's equitable power to imply remedies to the instant motion, it would seem fee shifting is appropriate. First, there is in the fourth amendment no detailed pattern of remedies such that one could fairly draw the inference that the remedies provided were complete. See *Fleishman Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714 (1967). See also *Bivens*, *supra*. The absence of a "meticulously detailed" pattern of remedies has been one signal that attorney's fees may be awarded as costs. *Mills*, 396 U.S. at 391. *Accord Hall v. Cole*, *supra*; *Lee v. Southern Homes*, 444 F.2d at 145; *La Raza Unida v. Volpe*, 57 F.R.D. at 99.

(June 23, 1972). Compare Opinion of the Court in *Hall v. Cole*, *supra*, with dissent of White, J. arguing that internal labor disputes were not of sufficient public concern to imply an attorney's fee award.

Like *La Raza*, no remedial action can be expected from public officials, as they are named as defendants in the action. Moreover, in *J.I. Case Co.*, *supra*, and *Mills*, *supra*, the Court was not content to rely solely on public enforcement by the Securities Exchange Commission for the important rights proclaimed in the statute.

Additionally, 42 U.S.C. § 1983 and its jurisdictional concomitant, 28 U.S.C. § 1343(3) represents congressional indication that federal courts should use their equitable powers to insure vindication of the rights protected by the Constitution and laws from infringement by those acting under color of state law, by implying an award of attorney's fees as costs. *Jinks v. Mays*, 250 F. Supp. 1037 (N.D. Ga. 1972). See *Donohue v. Stanton*, 471 F.2d 475, 482 (7th Cir. 1972); *N.A.A.C.P. v. Allen*, 340 F.Supp. 703 (N.D. Ala. 1972). The *raison d'être* of 42 U.S.C. § 1983 is to encourage the vindication of constitutional rights, to promote litigation of the rights involved, and to give the courts leeway to fashion appropriate remedies. Cf. 42 U.S.C. § 1988.

As to placing a high social order on the rights in question, there can be no doubt as to the importance of the fourth amendment. The Court in *Almeida-Sanchez v. United States*, 41 U.S.L.W. 4970 (June 21, 1973) recently recalled the words of Justice Jackson on his return from the Nuremberg Trials:

These [Fourth Amendment rights], I protest, are not mere second-class rights but belong in the catalog of indispensable freedoms. Among the deprivation of rights, none is so effective in cowing a

population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government. *Brinegar v. United States*, 388 U.S. 160, 180 (Jackson, J., dissenting).

Accordingly this court feels that in equitable suits to remedy violations of fourth amendment rights of those not suspected of criminal activity, an award of attorney's fees as costs is within the court's power and responsibility. Where as here fee shifting is necessary to insure the vindication of important constitutional rights¹⁷ and appropriate because of the inadequate remedies otherwise available, because it is consistent with a remedy increasingly furnished by Congress, and because of the high social value placed upon the rights involved, an award of attorney's fees as costs is essential, lest these important rights be relegated to a mere platitude.

¹⁷It has been argued that the *Daily* is a clearly identifiable plaintiff, so that even absent fee shifting these types of plaintiffs, not representatives of a class, might have sufficient incentive to litigate the matter. First it must be noted that other courts have not required class action status as a prerequisite to fee shifting. See *Donohue v. Stanton*, 471 F.2d 475 (7th Cir. 1972). Nor is class action status a requirement under any of the statutory schemes provided by Congress. See note 16, *supra*. Second, the *Daily* was fortunate enough to have a law professor on the Stanford campus willing to bring the litigation. But this Court has already indicated its unwillingness to rest the vindication of important rights on the chance that some attorney, public interest law firm, or legal aid agency will be willing to represent the plaintiff without hope of remuneration. *La Raza*, 57 F.R.D. at 101. See also *Id.* at 98 n.6.

B. Appropriateness of Fees in This Case.

Having determined that this is the type of case in which an award of attorney's fees as costs might be appropriate, the matter of the exercise of the court's discretion is not difficult.¹⁸ Even when no statute is involved, fees should ordinarily be awarded as costs in the appropriate type of case, unless there is an affirmative, articulated reason for the denial. *Cooper v. Allen*, 467 F.2d 836 (5th Cir. 1972). See *Northcross v. Memphis Bd. of Ed.*, *supra*. (statutory authorization).

Here counsel for plaintiff effectively represented his client and aided the court in an area scant with precedent to guide its decision. Accordingly this court finds that, this is the type of case in which the court has discretion to award the fees as costs, and this is an appropriate case for the exercise of that discretion.

IV.

Lastly, the defendants argue that they may assert as defense to the assessment of attorney's fees as costs, the legal defense to an action for monetary damages that the law enforcement acted in good faith and upon probable cause.¹⁹ *Pierson v. Ray*, 386 U.S. 547 (1967); *Anderson v. Reynolds*, 342 F.Supp. 101 (D. Utah 1972) (policeman); *Ney v. State of California*, 439 F.2d 1285, 1287 (9th Cir. 1971); *Dodd v. Spokane*

¹⁸*Kelly v. Guinn*, 456 F.2d 100 (9th Cir. 1970).

¹⁹See *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 456 F.2d 1339 (2d Cir. 1972). (on remand)

County, Washington, 393 F.2d 330 (9th Cir. 1968) (District Attorney in his investigative function).

Where an award of attorney's fees is made as an element of the costs of equitable litigation incident to the vindication, of otherwise unremediable constitutional rights, the fact that a prior action was taken in good faith would not seem relevant. An award for attorney fees and an award for damages have historically been separated. *See Day v. Woodworth*, 13 How. 363 (1851); 6 J. Moore, FEDERAL PRACTICE 1704. Unlike damages an award of attorneys' fees is not imposed in any way to penalize, stigmatize, or punish the defendants for wrongdoing. At this court said in *La Raza, supra*:

We cannot emphasize enough that in granting this motion, the purpose is not to saddle the losing party with the financial burden in order to punish him, rather we shift the financial burden in order to effectuate a strong Congressional policy. *Accord Mills*, 396 U.S. at 396-97. *Id.* at 102.

Moreover an award of attorney's fees as cost, at least in California, will not have the undesirable effect of hampering zealous law enforcement which so concerned the Court in *Pierson, supra*. For it is the law in this state that there is a mandatory duty of the City Attorney, or the County Counsel to *defend* the policemen or the district attorney. Any judgment against the public official shall be paid by the public entity which employed the individual, provided that he was acting within the scope of his employment at the time. Cal. Gov't. Code § 825, *et seq.* As such the action may proceed without any personal involvement

on the part of the individual. As the court said in *Sinclair v. Arnebergh*, 224 Cal. App. 2d 595 (1964):

With such protection afforded the public can expect that its laws will be zealously enforced without any hesitation occasioned by consideration of possible personal involvement in defending resulting litigation. *Id.* at 597-98.

See also 42 U.S.C. §1988; *Hesselgesser v. Reilly*, 440 F.2d 901 (9th Cir. 1971) cited with approval in *Moor v. County of Alameda*, 41 U.S.L.W. 4627 (May 14, 1973).

Accordingly this court finds that the legal defense of good faith enforcement of the law, found not to be abrogated by 42 U.S.C. § 1983, as against an action seeking monetary damages, has no place here where equitable relief is sought to declare rights and enjoin further illegal action. This is especially so in California where the public, and not the individual officer, will bear the responsibility for litigation and pay any judgment for attorney's fees rendered against the law enforcement personnel. The motion for an award of reasonable attorney's fees as costs is granted.

Dated: August 10, 1973

/s/ Robert F. Peckham
Robert F. Peckham
United States District Judge

Appendix E

In the United States District Court
Northern District of California

No. C-71-912 RFP (SJ)

<p>The Stanford Daily, et al.,</p>	<p>Plaintiffs,</p>
<p>vs.</p>	
<p>James Zurcher, individually and as Chief of Police of the City of Palo Alto, County of Santa Clara, State of California, et al.,</p>	<p>Defendants.</p>

[Filed Jul. 17, 1974]

MEMORANDUM AND ORDER

On October 5, 1972, this court ruled on plaintiffs' motion for summary judgment and granted declaratory relief which upheld the constitutional rights of individuals, not suspected of any crime, to be free from unwarranted police searches and seizures. *The Stanford Daily v. Zurcher*, 353 F.Supp. 124 (N.D.Cal. 1972). Subsequently, on August 10, 1973, the court granted plaintiffs' motion for an award of reasonable attorneys' fees. *The Stanford Daily v. Zurcher*, F.Supp. (N.D.Cal. 1973). Now, the court must determine what amount actually constitutes reasonable attorneys' fees.

The federal appellate courts, recognizing the difficulty of weighing the factors relevant to the determination of reasonable fees, grant federal district courts wide discretion in setting attorneys' fees. See, e.g., *Kelly v. Guinn*, 456 F.2d 99, 111 (9th Cir. 1972); *Cato v. Parham*, 403 F.2d 12, 16 (8th Cir. 1968); *Twentieth Century Fox Film Corp. v. Goldwyn*, 328 F.2d 190, 221 (9th Cir. 1964). However, district courts' exercise of this grant of discretionary authority must be kept within certain evidentiary bounds. See, e.g., *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). The court must avoid the Scylla of simply accepting the attorneys' account of the value of the legal services which they have provided. "The court cannot properly fix attorneys' fees merely by multiplying the hourly rate for each attorney times the number of hours he worked on the case." *Lindy Bros. Bldrs., Inc. of Phila. v. American R. and S. San. Corp.*, 487 F.2d 161 (3rd Cir. 1973). At the same time, the court must avoid the Charybdis of decreasing reasonable fees because the attorneys conducted the litigation more as an act pro bono publico than as an effort at securing a large monetary return. Cf. *Sims v. Amos*, 340 F.Supp. 691 (M.D. Ala.N.D. 1972). The rationale of awarding reasonable attorneys fees, after all, springs from the need for placing the legal defense of certain constitutional principles and some congressional policies on an equal footing with the protection of private interests. Cf. *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 402 (1971); *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400

(1968); *Schaeffer v. San Diego Yellow Cabs, Inc.*, 462 F.2d 1002, 1008 (9th Cir. 1972). See generally Note, Allowance of Attorneys' Fees in Civil Rights Litigation, 7 Colum. J.L. and Soc.Prob. 381 (1971).

The Ninth Circuit, in *Brandenberger v. Thompson*, ___ F.2d ___ (9th Cir. March 25, 1974), suggested that district courts might consider the evidentiary factors listed in two cases from other circuits in determining reasonable attorneys' fees.

One case, *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974) (concerning attorneys' fees in a Title VII action), lists twelve factors: the time and labor required; the novelty and difficulty of the questions; the skill requisite to perform the legal service properly; the preclusion of other employment due to acceptance of the case; the customary fee; the contingent or fixed nature of the fee; the time limitations imposed by the client or the case; the amount involved and the results obtained; the experience, reputation, and ability of the attorneys; the "undesirability" of the case; the nature of the professional relationship with the client; and awards in similar cases. The Fifth Circuit's list does not offer a useful catalogue of factors which a district court might consider in setting reasonable attorneys' fees. Of course, a district court might not find it possible to consider all, or most of, the factors in any one case. For example, this court notes that the novelty of the legal issues in this litigation makes it impossible to rely on the history of attorneys' fees awards in other cases. Also, the Fifth Circuit's opin-

ion does not indicate how a district court is to use the list, how a court is to attach a relative weight to the different factors in determining an award.

The other case, *Lindy Bros. Bldrs., Inc. of Phila. v. American R. and S. San. Corp.*, 487 F.2d 161 (3rd Cir. 1973) (concerning attorneys' fees in an antitrust action), suggests, *inter alia*, that a district court first determine fees in terms of actual hours worked and normal billing rates and, then, modify this sum in light of the contingent nature of success and of the quality of the attorneys' work. The Third Circuit's approach does present a procedure for ordering the examination of factors. It thereby complements the discussion offered in *Johnson*. But, the approach might present problems in specific cases. The variable factors—the contingent nature of success and the quality of the attorneys' work—oftentimes will be interrelated. For example, an increase in the attorneys' fees because the chances of success (and for fees) at the beginning of litigation appeared slight is implicitly if not explicitly an increase due to the high caliber of the attorneys' representation. Thus, consideration of different factors, without recognition of their overlap, might unintentionally lead to an unnecessary inflation of the attorneys' fees award.

This court, following the suggestion of the Ninth Circuit, intends to consider many of the factors listed in *Johnson* within a modified version of the framework offered in *Lindy Bros.* Specifically, the court will consider: the amount of time devoted by the attorneys to the litigation; the value of the time in

light of billing rates and of the attorneys' experience, reputation, and ability; and the attorneys' performance, given the novelty and the complexity of the legal issues in the litigation. This consideration will be grounded upon the court's opportunity to view the attorneys' work during the course of litigation and upon the information provided by the parties in their numerous briefs and affidavits. Fortunately, the court has access to the detailed, factual information necessary to reach an informed decision on the issue. *Cf. Lindy Bros. Bldrs., Inc. of Phila. v. American R. and S. San. Corp.*, *supra* at 169.

The Time Devoted to the Litigation

Plaintiffs' attorneys, by affidavits, have itemized over 750 hours of working time spent on this litigation. This itemization does not include time spent either by Anthony Amsterdam, Professor of Law at Stanford Law School, or by a law student and a law clerk who researched various legal issues and assisted in the factual investigation.¹

Defendants do not challenge the accuracy of the time records submitted by plaintiffs' attorneys but do contend that the attorneys spent an unreasonable number of hours on the case.

¹The attorneys' decision to not seek compensation for certain individual's hours, whatever their motivation, does not lessen their burden of establishing the reasonableness of the number of hours for which they do seek compensation. Their decision may have the effect of lightening defendants' liability, but it does not eliminate the need for close court scrutiny of their hours. On the contrary, the court now must determine the reasonableness of the hours in light of the fact that the attorneys did not construct their case solely within the hours for which they claim compensation. See discussion *infra*.

Defendants complain about the amount of time devoted to specific projects, such as the formulation of the complaint, about the use of attorneys for factual investigations and at depositions, and about the appearance of more than one attorney at court hearings and conferences. Clearly, attorneys should not be compensated for unnecessary work. See Canon 2 of the Code of Professional Responsibility of the American Bar Association, Disciplinary Rule 2-106. Attorneys should attempt to minimize duplication of their efforts. See, e.g., *Pacific Coast Agric. Export Ass'n v. Sunkist Growers, Inc.*, 1973 Trade Case, §§ 74,523, at 94,344 (N.D.Cal. 1973); *Bowl America Inc. v. Fair Lanes, Inc.*, 299 F.Supp. 1080, 1100 (D. Md. 1969); *Advance Business Systems and Supply Co. v. SCM Corp.*, 287 F.Supp. 143, 161 (D.Md. 1968). This court, however, finds that a careful review of the time records provides no ground for exclusion of any of the attorneys' time in calculating reasonable attorneys' fees. The facts of the case, the legal issues involved in its resolution, and arguments advanced by defendants required the number of hours of time which plaintiffs' attorneys expended.² This conclusion receives indirect support from the simple fact that plaintiffs' attorneys, who had no assurance that attorneys' fees would eventually be granted, had incen-

²The large number of hours expended by plaintiffs' attorneys was necessitated not only by their claims but also from a need to counter the defendants' numerous affirmative defenses to the complaint and various motions. The court does not base its calculations of a fees award on the assumption that defendants acted in bad faith or with dubious motives. Rather, the court simply notes that the strategy adopted by defendants added hours to plaintiffs' work.

tive to minimize rather than maximize the amount of time spent on the case. Their work on this case necessarily reduced their opportunity for work on other legal matter for which fees were guaranteed.

Defendants also contend that the attorney time devoted to the question of the propriety of awarding attorneys' fees should not be counted in setting the award. This contention does not square with federal court decisions which make no distinction, in calculating fees, between attorney hours spent on the merits and on the issue of counsel fees. E.g., *Miller v. Amusement Enterprises, Inc.*, 476 F.2d 534, 539 (5th Cir. 1970). The contention, if accepted, would allow parties to dilute the value of a fees award by forcing attorneys into extensive, uncompensated litigation in order to gain any fees.

Defendants additionally argue that the attorney time expended on plaintiffs' motion for a preliminary injunction should be excluded from the fees calculation. This motion, which was made after a declaratory judgment had been entered and the issue of attorneys' fees had been resolved, evidently was triggered by plaintiffs' fear that a police search of the Stanford Hospital evidenced defendants' intention to violate the spirit if not the letter of the court's judgment. The motion was denied by minute order—but only after defendant Bergna represented to the court that defendants would not engage in searches of the premises of newspapers. The minute order, it should be noted, referred to this representation.

Some federal court decisions reason that hours spent on the litigation of unsuccessful claims should be

deducted from the number of hours upon which an attorneys' fee award is computed. See *Bowl America Inc. v. Fair Lanes, Inc.*, 299 F.Supp. 1080, 1100 (D. Md. 1969); *Osborn v. Sinclair Refining Co.*, 207 F. Supp. 856, 864 (D.Md. 1962), rev'd and remanded on other grounds, 324 F.2d 566 (4th Cir. 1963). However, several recent decisions, adopting a different tack, deny fees for clearly meritless claims but grant fees for legal work reasonably calculated to advance their clients interests. These decisions acknowledge that courts should not require attorneys (often working in new or changing areas of the law) to divine the exact parameters of the courts' willingness to grant relief. See, e.g., *Trans World Airlines v. Hughes*, 312 F.Supp. 478 (S.D.N.Y. 1970), aff'd with respect to fee award, 449 F.2d 51 (2nd Cir. 1971), rev'd on other grounds, 409 U.S. 363 (1973). One Seventh Circuit panel, for example, allowed attorneys' fees for legal services which appeared unnecessary in hindsight but clearly were not "manufactured." *Locklin v. Day-Glo Color Corporation*, 429 F.2d 873, 879 (7th Cir. 1970) (concerning fees for antitrust counterclaims).

Plaintiffs' attorneys obviously were not manufacturing legal services in constructing their preliminary injunction motion. They did not secure the full, injunctive relief which they originally requested, but they did obtain a significant concession from defendants as a result of their motion. In the process, they substantially advanced their clients interests. The court finds that the attorney time spent on this motion (approximately 50 hours) should be counted in determining a proper award.

The Value of the Attorneys' Services

Plaintiffs' attorneys, by affidavit, provide information concerning their individual billing rates for fixed-fee services. The attorneys bill their clients at rates which range from \$50 an hour to \$65.00 an hour.

This court does not accept the attorneys' usual billing rates as definitively fixing their billing rates for this litigation. This reluctance follows from the simple fact that attorneys may be leaving the area of their professional expertise in taking on pro bono publico litigation and that, as a result, their billing rates should reflect this fact. As an example, large-firm attorneys who draw \$65 an hour for their specialized knowledge of securities regulation should not earn the same figure for § 1983 litigation, unless they have an equivalent type of specialized knowledge of civil rights litigation. Cf. *Johnson v. Georgia Highway Express, Inc.*, supra at 717-720; *Lindy Bros. Bldrs., Inc. of Phila. v. American R. and S. San. Corp.*, supra at 167.

In the instant case, plaintiffs' attorneys charge at rates which, in this court's experience, compare favorably with the rates charged by other attorneys in this area for work involving complex questions of fact and law. Also, these rates reflect the attorneys' expertise: each of plaintiffs' attorneys has had considerable experience with civil rights litigation, and their hourly rates fairly reflect their experience.

Defendants Bergna and Brown, undoubtedly recognizing the excellent academic and professional backgrounds of plaintiffs' attorneys, concede that use of

the billing rate of \$50 an hour in calculating reasonable attorneys' fees would be appropriate. This figure is only \$1.70 an hour less than the average hourly rate which plaintiffs' attorneys recommend to the court.

In light of these facts, the court finds \$50 an hour to be an appropriate average hourly rate for use in calculating an award of reasonable attorneys' fees.

Attorneys' Performance

1. The Contingent Nature of Success

Plaintiffs' attorneys argue that they assumed this case on a contingent fee basis. They contend that any attorneys' fees award, initially computed on the basis of number of work hours times the average hourly billing rate, must be increased to reflect the contingent nature of their recovering any award.

Federal court decisions generally reason that the amount of any award of attorneys' fees should reflect any contingencies which stood between the attorneys and their deserved fee. *E.g., Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 718 (5th Cir. 1974); *Lindy Bros. Bldrs., Inc. of Phila. v. American R. and S. San. Corp.*, 487 F.2d 161, 168 (3rd Cir. 1973); *Freeman v. Ryan*, 408 F.2d 1204, 1206 (D.C. Cir. 1969); *State of Illinois v. Harper and How Publishers, Inc.*, 55 F.R.D. 221 (N.D. Ill. 1972). These decisions parallel the American Bar Association's determination that attorneys deserve higher compensation for contingent than for fixed-fee work. *Cf.* Canon 2 of the Code of Professional Responsibility of

the American Bar Association, Disciplinary Rule 2-106(B)-(8) (1969).

For the attorneys' standpoint, the contingent fee insures that counsel are compensated not only for their successful efforts but also for unsuccessful litigation. Its use allows attorneys—including attorneys who could not otherwise absorb the costs of lost cases—to take the financial gamble of representing penurious clients, since, over the long run, substantial fees awards in successful cases will provide full and fair compensation for all legal services rendered to all clients. From the public's standpoint, the contingent fee helps equalize the access of rich, middle-class, and poor individuals to the courts by making attorney decisions concerning representation turn on an action's merits rather than on the size of a client's income. Courts' application of the doctrine in the aid of "private attorneys general" helps attract attorneys to the enforcement of important constitutional principles and significant congressional policies which might otherwise go unrepresented. Comment, *Court Awarded Attorney's Fees and Equal Access to the Courts*, 122 U.Pa.L.Rev. 636, 650-652, 708-711 (1974).

Federal courts' failure to make contingency calculations in determining fees awards, in contrast, would discourage many attorneys from accepting pro bono publico cases by presenting them with the financially unacceptable "risk of wasting hours of work, overhead and expenses" over a course of successful and unsuccessful civil actions. *Angoff v. Goldfine*, 270 F.2d 185, 189 (1st Cir. 1959).

Of course, the contingent fee doctrine has its genesis in the type of litigation in which the victorious plaintiff collects monetary relief from his adversary. The attorney accepts a case on the promise that he will share in whatever monies the plaintiff secures. The size of his share principally depends on the strength of the case: usually the stronger the case the smaller the attorney's share. The genesis of the doctrine does not preclude its use in the type of litigation in which the plaintiff obtains equitable but not monetary relief and the court retains the authority to order defendants to pay for the value of plaintiff's legal services. The doctrine, after all, does not concern the source of payment for legal services, but rather the size of the payment. The doctrine simply suggests that the contingent nature of compensation be considered in assessing the reasonableness of any fee.

Plaintiffs' attorneys correctly label this action as justifying the application of the contingent fee doctrine: at the beginning of the litigation, they could have expected an award of attorneys' fees only if this court ruled in plaintiffs' favor on the merits, only if the court ruled an award of fees appropriate, and only if the Ninth Circuit, and perhaps the Supreme Court, affirmed these determinations. Plaintiffs attorneys conducted the litigation in the face of these contingencies, expending a significant number of attorneys' hours and absorbing the necessary costs of the case without any hope of certain payment.

Admittedly, the attorneys were guaranteed payment by their clients for some of the hours which they

worked. The attorneys accepted the case only after The Stanford Daily agreed to pay \$5,000 plus whatever funds which they could raise from interested third parties. In the end, the attorneys received \$8,500 from their clients. These payments, of course, were not dependent on the vagaries of the litigation. However, the attorneys clearly were not guaranteed payment for most of the hours which they expended. At the beginning of the litigation, they undoubtedly realized that full payment for their services depended on the unforeseeable turns of the litigation process working in their clients' favor. In short, the fact that a fraction of their fees were guaranteed should not obscure the fact that the remainder was contingent on their success.⁹

Clearly, this court must increase the fees award obtained by multiplying the number of work hours by the average billing rate to reflect the fact that the attorneys' compensation, at least in part, was contingent in nature.

2. The Attorneys' Work

Plaintiffs maintained this civil action in an attempt at securing "the vindication of important constitutional rights." *The Stanford Daily v. Zurcher*, ____ F.Supp. ____ (N.D.Cal. 1973). Their attempt neces-

⁹This court assumes that plaintiffs' attorneys did not expect their clients to finance most of, let alone all of, their efforts. The facts of the case warrant this assumption. However, it should be noted that plaintiffs' attorneys admit that they did not expect to spend the large number of hours of work which the litigation eventually required when they accepted the case. Thus, hindsight may make the litigation take on a contingent flavor which is partially unjustified.

sarily entailed their attorneys' construction of complex, and convincing, legal arguments which would justify the extrapolation of traditional Fourth Amendment standards to a novel fact situation. They could not rely solely on the "very few cases [which] discuss Fourth Amendment protection of third parties"; they could not cite to "any case which discusses the problem of when law enforcement agencies must use a subpoena duces tecum rather than a search warrant." *The Stanford Daily v. Zurcher*, 353 F. Supp. 124, 127 (N.D.Cal. 1972). Rather, they faced the task of breaking fresh ground in securing a novel application of an old constitutional principle.

The novelty of the issues in a case does not automatically increase the number of hours of work which attorneys must expend. "An area of the law which is barren of precedent may eliminate hours of research and preparation otherwise needed. It may also necessitate a more time-consuming search for analogous authority." *United States v. Gray*, 319 F.Supp. 871, 873 n.2 (D.R.I. 1970). But, novelty often does transform the practice of law into "an art in which success depends as much as in any other art on the application of imagination—and sometimes inspiration—to the subject matter." *Woodbury v. Andrew Jergens Co.*, 37 F.2d 749, 750 (S.D.N.Y. 1930), quoted with approval, *Sampsell v. Monell*, 162 F.2d 4, 6-7 (9th Cir. 1947). This case, in fact, posed this type of challenge.

Plaintiffs' attorneys reacted to the challenge in an admirable fashion: their presentation of issues, both in written papers and in oral argument was good;

their illumination of the controlling constitutional principles was excellent; their advocacy of their clients' interests was thoughtful. Additionally, the attorneys reacted well to defendants' maneuvers, offering legal research of high quality in response to defendants' answer and motions.

This court, in short, notes that plaintiffs' attorneys provided excellent legal services and that they, for the most part, successfully advanced their clients' interests. These facts weigh in favor of increasing the fees award. See George D. Hornstein, *Legal Therapeutics: The "Salvage" Factor in Counsel Fee Awards*, 69 Harv.L.Rev. 658, 660-661 (1956). However, another fact suggests restraint in increasing the award.

Plaintiffs' attorneys, as noted *supra*, do not seek compensation either for the time of Professor Anthony Amsterdam or for the work of a law student and a law clerk. The attorneys estimate, in an affidavit, that Professor Amsterdam expended not less than 75 hours on the litigation. The court notes that his participation in oral argument greatly facilitated the court's resolution of some of the complex legal issues of the case. Also, the court assumes that the high quality of plaintiffs' written work can be traced, at least in small part, to his hours on the case. The attorneys state that a law student and a law clerk engaged in substantial work on the litigation and note that one law student researched the crucial Fourth Amendment issues which controlled the course of the litigation. Again, this court assumes that the student

and the clerk helped the attorneys assemble their excellent case.

This court cannot adjust the fees award to reflect the quality of the attorneys' work without taking into account the fact that the award will not go to some of the individuals who performed significant legal services and who may be partially responsible for the general excellence of the attorneys' work. Rather, the court must adjust the award so that the attorneys who actually will share in the award will be compensated, as near as possible, only for their contribution to the litigation. This approach attempts to avoid any unreasonable enrichment of the attorneys who ask the court for fees.

With the caveat in mind, the court finds that the attorneys' work, and the results which they obtained through their work, merit an increase in the base figure upon which a reasonable attorneys' fees award is computed.

Conclusion

The court finds that plaintiffs' attorneys devoted approximately 750 hours to the prosecution of this action on behalf of their clients and that this figure does not reflect the time expended by Professor Anthony Amsterdam and by certain other individuals. The court finds no reason to exclude any of the time in determining a reasonable fees award.

The court also find that \$50.00 an hour is an appropriate average billing rate for use in determining a reasonable award.

The court also finds that the contingent nature of compensation, the quality of the attorneys' work, and the results obtained by the litigation warrant increasing the base fees figure (hours worked times average billing rate) in determining the award.

Accordingly, plaintiffs' attorneys are awarded fees in the sum of \$47,500.

So ordered.

Dated: July 17, 1974

/s/ Robert F. Peckham
United States District Judge

Appendix F

United States District Court
Northern District of California

No. C-71 912 RFP (SJ)

The Stanford Daily, Felicity A. Barringer,
Fred Mann, Edward H. Kohn, Richard Lee
Greathouse, Robert Litterman, Hall Daily
and Steven G. Ungar,

Plaintiffs,

vs.

James Zurcher, individually and as Chief of
Police of the City of Palo Alto, County of
Santa Clara, State of California, James
Bonander, Paul Deisinger, Donald Martin
and Richard Peardon, all individually and
as Police Officers of the City of Palo Alto,
County of Santa Clara, State of California,
Louis P. Bergna, individually and as Dis-
trict Attorney for the County of Santa
Clara, State of California, Craig Brown,
individually and as Deputy District At-
torney for the County of Santa Clara, State
of California,

Defendants.

[Filed Jul. 23, 1974]

JUDGMENT

This cause came on to be heard on motion of the
plaintiffs for summary judgment pursuant to Rule
56 of the Federal Rules of Civil Procedure, and the
Court having read the pleadings and records on file

and considered the affidavits of plaintiffs in support of the motion and the affidavits of the defendants in opposition thereto, and the Court having heard the argument of counsel, and due deliberation having been had thereon, and the Court having prepared and filed a Memorandum and Order on October 5, 1972, granting plaintiffs' motion for summary judgment, and the Court having read the pleadings and records on file and considered the affidavits in support of plaintiffs' motion for an award of attorneys fees, and the Court having heard the argument of counsel, and due deliberation having been had thereon, and the Court having prepared and filed a Memorandum and Order on August 10, 1973, granting plaintiffs' motion for an award of attorneys fees, and the Court having fixed the amount of \$47,500 as reasonable attorneys fees on July 17, 1974,

It Is Hereby Ordered, Adjudged and Decreed that:

1. There is no genuine issue as to any material fact and that plaintiffs are entitled to judgment as a matter of law against each and all of the defendants (other than defendant J. Barton Phelps who was dismissed with prejudice on December 15, 1972) in conformity with the Memorandum and Order granting declaratory relief previously filed by the Court herein;

2. Plaintiffs recover from defendants, and each of them, attorneys fees in the amount of \$47,500.00, with interest thereon at the rate of seven percent (7%) per annum as provided by law, and that plaintiffs recover their other costs of suit;

3. This judgment shall be without prejudice to the right of plaintiffs to seek further relief based upon the declaratory judgment heretofore rendered in this cause whenever necessary or proper or the right of plaintiffs to seek further award for such attorneys fees as are incurred upon any appeal herein.

Dated: July 23, 1974.

/s/ Robert F. Peckham
United States District Judge

Appendix G

United States District Court
For the Northern District of California
San Jose, California

No. C-71-912-RFP(SJ)

The Stanford Daily, et al.,	} Plaintiffs,
vs.	
James Zurcher, et al.,	
	Defendants.

[Filed Jul. 25, 1974]

NOTICE OF ENTRY OF JUDGMENT**To:**

Anthony G. Amsterdam
Stanford University Law School
Palo Alto, California
Howard, Prim, Smith, Rice & Downs
650 California St.,
San Francisco, 94108
Peter G. Stone
605 Castro Street,
Mt. View, Ca. 94040
William M. Siegel
Shelby Brown Jr.
County Administration Building
70 West Harding Street
San Jose, Ca.

You Are Hereby Notified That on July 25th, 1974
Judgment Was Entered in Favor of Plaintiff in the
Above-Entitled Case.

F. R. Pettigrew, Clerk

By: John B. Pomeroy Jr.

Deputy Clerk-in-charge

San Jose, California

Dated: July 25th, 1974

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JOINT APPENDIX

Supreme Court, U. S.
FILED

NOV 11 1977

MICHAEL RODAK, JR., CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1977

No. 76-1484

JAMES ZURCHER, et al.,
Petitioners,

VS.

THE STANFORD DAILY, et al.

No. 76-1600

LOUIS P. BERONA, District Attorney, et al.,
Petitioners,

VS.

THE STANFORD DAILY, et al.

**On Writs of Certiorari to the United States Court of Appeals
for the Ninth Circuit**

Petitions for Writ of Certiorari Filed
April 26 and May 16, 1977
Certiorari Granted October 3, 1977

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¹The following may be found in the Appendices of both petitions for certiorari: The opinion of the Court of Appeals filed February 2, 1977 (Appendix A); the Court of Appeals' order denying the petition for rehearing and rejecting the suggestions for rehearing en banc filed March 28, 1977 (Appendix B); the opinion of the United States District Court for the Northern District of California filed October 5, 1972 (Appendix C); memorandum and order of the United States District Court for the Northern District of California granting attorneys' fees filed August 10, 1973 (Appendix D); memorandum and order of the United States District Court for the Northern District of California fixing attorneys' fees at \$47,500. (Appendix E); judgment of the United States District Court for the Northern District of California filed July 23, 1974 (Appendix F); and notice of entry of judgment by the United States District Court for the Northern District of California filed July 25, 1974 (Appendix G).

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JOINT APPENDIX

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1977

No. 76-1484

JAMES ZURCHER, et al.,
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vs.

THE STANFORD DAILY, et al.

**On Writs of Certiorari to the United States Court of Appeals
for the Ninth Circuit**

**Petitions for Writ of Certiorari Filed
April 26 and May 16, 1977
Certiorari Granted October 3, 1977**

**CHRONOLOGICAL LIST OF
RELEVANT DOCKET ENTRIES**

- May 13, 1971 (USDC)—Plaintiffs' complaint for declaratory and injunctive relief filed in the United States District Court for the Northern District of California.
- May 13, 1971 (USDC)—Order for service of process by Emory Wes Sage filed.
- May 13, 1971 (USDC)—Plaintiffs' notice and motion for intradistrict transfer of venue to San Jose filed.
- June 2, 1971 (USDC)—Stipulation extending time to June 11, 1971 for defendants to answer complaint filed.
- June 2, 1971 (USDC)—Return on summons for all defendants filed.
- June 2, 1971 (USDC)—Answer to complaint of defendants Phelps, Bergna and Brown filed.
- June 4, 1971 (USDC)—Defendants' notice of requirement of three-judge court filed.
- June 7, 1971 (USDC)—Plaintiffs' motion for transfer of venue granted and case transferred to San Jose calendar.
- June 8, 1971 (USDC)—Answer to complaint of police defendants filed.
- June 10, 1971 (USDC)—Police defendants notice of requirement of three-judge court filed.
- June 11, 1971 (USDC)—Case continued to September 10, 1971 for hearing on motions.

- June 25, 1971 (USDC)—Stipulation on time to file pleadings on three-judge court and dismissal approved and filed.
- August 12, 1971 (USDC)—Defendants' memorandum on three-judge court filed.
- August 13, 1971 (USDC)—Defendants' notice and motion to dismiss or stay action filed.
- August 23, 1971 (USDC)—Plaintiffs' memorandum of points and authorities in opposition to defendants' motion to dismiss or stay and in opposition to three-judge court filed.
- August 30, 1971 (USDC)—Defendants' Bergna, Brown and Phelps reply to plaintiffs' memorandum of points and authorities in opposition to motion to dismiss or stay filed.
- September 8, 1971 (USDC)—Defendants' reply to plaintiffs' memorandum of points and authorities in opposition to three-judge court filed.
- September 10, 1971 (USDC)—Defendants' motion to convene three-judge court and to dismiss or stay submitted.
- September 23, 1971 (USDC)—Request for three-judge court denied and motion to dismiss or abstain denied.
- October 8, 1971 (USDC)—Defendants' notice of time and place of taking depositions of plaintiffs filed.
- June 12, 1972 (USDC)—Defendants' notice of time and place of taking depositions of plaintiffs filed.

June 14, 1972 (USDC)—Plaintiffs' notice of motion and motion for protective order filed.

June 14, 1972 (USDC)—Affidavit of Jerome B. Falk, Jr. filed.

June 14, 1972 (USDC)—Affidavit of service by mail of document filed.

June 19, 1972 (USDC)—Plaintiffs' notice of motion and motion for summary judgment filed.

June 19, 1972 (USDC)—Plaintiffs' points and authorities in support of motion for summary judgment filed.

June 19, 1972 (USDC)—Affidavits in support of plaintiffs' motion for summary judgment filed.

June 21, 1972 (USDC)—Plaintiffs' corrected notice of motion for protective order filed.

June 26, 1972 (USDC)—Defendants' request for admissions filed.

July 7, 1972 (USDC)—Defendants' memorandum of points and authorities and affidavits in opposition to motion for summary judgment filed.

July 7, 1972 (USDC)—Index to affidavits in opposition to motion for summary judgment filed.

July 7, 1972 (USDC)—Defendants' memorandum of points and authorities and affidavits in opposition to motion for protective order filed.

July 10, 1972 (USDC)—Plaintiffs' reply memorandum filed.

July 10, 1972 (USDC)—Defendants' memorandum in opposition to plaintiffs' motion for summary judgment and partial list of fact issues filed.

July 10, 1972 (USDC)—Plaintiffs' motion for protective order and for summary judgment order submitted and motion for summary judgment severed as to defendant Judge Phelps.

October 5, 1972 (USDC)—Memorandum and order ruling in favor of plaintiffs but denying permanent injunction filed.

November 6, 1972 (USDC)—Notice of appeal filed by defendants.

November 7, 1972 (USDC)—Notice of filing of appeal mailed to parties of record and Ninth Circuit Court of Appeals.

November 9, 1972 (USDC)—Substitution of attorneys for defendant Phelps filed.

November 15, 1972 (USDC)—Designation of record on appeal filed.

November 16, 1972 (USDC)—Judgment filed on November 14, 1972, entered and notice of entry of judgment mailed to parties of record.

November 16, 1972 (USDC)—Clerk's memorandum to counsel on designation of record filed.

November 17, 1972 (USDC)—Defendants Bergna's and Brown's notice of disapproval of form of judgment filed.

December 15, 1972 (USDC)—Record on appeal mailed to Ninth Circuit Court of Appeals.

December 15, 1972 (USDC)—Dismissal with prejudice as to defendant J. Barton Phelps filed.

December 15, 1972 (USDC)—Order setting aside and vacating judgment failed.

December 21, 1972 (USDC)—Receipt from Ninth Circuit Court of Appeals of record on appeal filed.

January 3, 1973 (USDC)—First supplemental record on appeal mailed to Ninth Circuit Court of Appeals.

February 7, 1973 (USDC)—Plaintiffs' notice of motion and motion for attorneys' fees filed.

March 27, 1973 (USDC)—Memorandum of points and authorities in opposition to plaintiffs' motion for attorneys' fees and proof of service of memorandum filed.

March 30, 1973 (USDC)—Plaintiffs' reply memorandum in support of motion for attorneys' fees filed.

March 30, 1973 (USDC)—Supplemental affidavit of Jerome B. Falk, Jr. filed.

April 2, 1973 (USDC)—Motion for attorneys' fees submitted.

April 16, 1973 (USDC)—Defendants' notice of motion and motion to dismiss complaint or for summary judgment filed.

June 5, 1973 (USDC)—Plaintiffs' memorandum of points and authorities in opposition to defendants' motion to dismiss or for summary judgment filed.

June 11, 1973 (USDC)—Stipulation and order on plaintiffs' response to defendants' motion to dismiss or for summary judgment, defendants' reply, and submission of the motion filed.

June 19, 1973 (USDC)—Plaintiffs' notice of motion and motion for preliminary injunction and order shorting time for service of motion on defendants filed.

June 20, 1973 (USDC)—Affidavit of service by mail of notice and motion for preliminary injunction filed.

June 20, 1973 (USDC)—Reply memorandum in support of defendants' motion to dismiss complaint or for summary judgment filed.

June 25, 1973 (USDC)—Memorandum of points and authorities in opposition to plaintiffs' motion for a preliminary injunction filed.

June 27, 1973 (USDC)—Argument in opposition to request for preliminary injunction filed.

June 27, 1973 (USDC)—Motion for preliminary injunction submitted.

August 10, 1973 (USDC)—Memorandum and order that plaintiffs' motion for award of reasonable attorneys' fees as cost be granted filed.

September 28, 1973 (USDC)—Unreported minute order that plaintiffs' motion for preliminary injunction is denied and further order that motion of defendant Palo Alto police parties is denied filed.

January 9, 1974 (USDC)—Plaintiffs' notice of motion and motion for award of attorneys' fees filed.

January 10, 1974 (USDC)—Clerk's notice of resetting plaintiffs' motion for award of attorneys' fees filed.

February 19, 1974 (USDC)—Depositions of Robert H. Mnookin, Jerome B. Falk, and Franklin R. Garfield filed.

March 4, 1974 (USDC)—Stipulation and order continuing motion for attorneys' fees filed.

March 13, 1974 (USDC)—Agreement and order to continue plaintiffs' motion for attorneys' fees filed.

March 18, 1974 (USDC)—Memorandum of defendants' on the amount of attorneys' fees to be awarded filed.

March 21, 1974 (USDC)—Opposition of defendants Bergna and Brown to the amount plaintiffs request for attorneys' fees filed.

March 21, 1974 (USDC)—Affidavit of Peter G. Stone filed.

April 1, 1974 (USDC)—Reply memorandum in support of plaintiffs' motion for award of attorneys' fees filed.

April 1, 1974 (USDC)—Affidavit of Jerome B. Falk, Jr. filed.

April 8, 1974 (USDC)—Plaintiffs' motion for attorneys' fees submitted.

April 8, 1974 (USDC)—Corrections to depositions of Garfield and Falk filed.

April 16, 1974 (USDC)—Corrections to deposition of Robert Mnookin filed.

July 17, 1974 (USDC)—Memorandum and order that plaintiffs be awarded attorneys' fees in the sum of \$47,500 filed.

July 25, 1974 (USDC)—Judgment that plaintiffs are entitled to declaratory relief in conformity with memorandum and order previously filed, that plaintiffs recover attorneys' fees with interest, that plaintiffs recover their other costs of suit, and that the judgment is without prejudice to plaintiffs seeking further relief entered and notice of entry of judgment filed.

August 6, 1974 (USDC)—Plaintiffs' motion to tax costs filed.

August 12, 1974 (USDC)—Clerk's notice that \$147 in costs is taxed filed.

August 16, 1974 (USDC)—First supplemental certificate of clerk to record on appeal filed.

August 21, 1974 (USDC)—Joint notice of appeal to the Court of Appeals filed by defendants.

August 22, 1974 (USDC)—Notice to counsel of record on appeal mailed.

September 4, 1974 (USDC)—Plaintiffs and defendants' designation of the record on appeal filed.

September 13, 1974 (USDC)—Application for order for extension of time for filing record and docketing appeal and affidavit in support thereof filed.

September 13, 1974 (USDC)—Order extending time to file record and docket appeal filed.

September 13, 1974 (USDC)—Defendants' supersedeas bond on appeal approved and filed.

November 20, 1974 (USCA)—Case docketed and appearances of counsel entered.

November 20, 1974 (USCA)—Appellants' motion for extension of time to file record filed.

November 27, 1974 (USCA)—Order granting appellants' motion for extension of time to file record entered.

November 30, 1974 (USCA)—Appellants' motion for extension of time to file record filed.

December 9, 1974 (USDC)—Defendants Bergna's and Brown's supersedeas bond on appeal approved and filed.

December 9, 1974 (USDC)—Supersedeas bond on appeal approved and filed.

January 6, 1975 (USCA)—Order granting extension of time to file record on appeal entered.

January 7, 1975 (USDC)—Reporter's Transcript of June 11, 1971, September 10, 1971, July 10, 1972, April 2, 1972, and June 27, 1973 filed.

January 20, 1975 (USDC)—Record sent to Circuit Court of Appeals and notices mailed to counsel of record.

January 21, 1975 (USCA)—Certified transcript of record on appeal filed.

March 24, 1975 (USDC)—Receipt of record from Ninth Circuit Court of Appeals filed.

April 3, 1975 (USDC)—Two additional copies of the record filed.

April 15, 1974 (USDC)—Appellants' ex parte motion for order to augment the record and for extension of time to file appellants' brief filed.

April 16, 1975 (USDC)—Letter from Ninth Circuit Court of Appeals to counsel on renumbering pages of the record on appeal filed.

April 22, 1975 (USCA)—Order granting appellants' motion to augment the record and granting further time for filing appellants' brief filed.

April 24, 1975 (USDC)—Copy of order from Ninth Circuit Court of Appeals granting defendants' motion to augment record on appeal filed.

April 24, 1975 (USDC)—First supplemental record on appeal to the Ninth Circuit Court of Appeals.

May 16, 1975 (USDC)—Appellants' ex parte motion for extension of time for filing brief filed.

May 21, 1975 (USCA)—Order extending time for filing appellants' brief filed.

May 21, 1975 (USCA)—Two additional copies of the record filed.

May 22, 1975 (USCA)—Certified supplemental transcript of record on appeal filed.

June 5, 1975 (USCA)—Received 25 copies of amicus brief with motion for leave to file.

June 13, 1975 (USCA)—Appellants' brief filed.

June 17, 1975 (USCA)—The motion to file amicus curiae brief denied.

July 14, 1975 (USCA)—Appellees' motion for extension of time to file brief filed.

July 21, 1975 (USCA)—25 copies of amicus curiae brief for State of California received with motion to permit late filing of brief.

July 24, 1975 (USCA)—Clerk ordered to file the brief of the State of California.

July 24, 1975 (USCA)—Order granting appellees an extension of time to file brief filed.

August 8, 1975 (USCA)—Appellees' brief filed.

August 22, 1975 (USCA)—Appellees' reply brief filed.

October 6, 1976 (USCA)—Received letter from Attorney General about additional citations.

October 6, 1976 (USCA)—Received letter from appellees about additional citations.

October 13, 1976 (USCA)—Case argued and submitted.

November 3, 1976 (USCA)—Received appellees' supplemental brief with motion for leave to file it.

November 22, 1976 (USCA)—Appellees' motion for leave to file a supplemental brief is granted and appellants are given ten days in which to reply.

Submission is vacated until ten days following entry of the order.

December 2, 1976 (USCA)—Appellants' response to supplemental brief of appellees filed.

January 19, 1977 (USCA)—Received letter from Jerome B. Falk about additional citations.

February 3, 1977 (USCA)—Received letter from appellant requesting that no consideration be given to the Wade decision.

February 2, 1977 (USCA)—Opinion affirming the decision below filed and judgment entered.

February 14, 1977 (USCA)—Appellants' notice of joining of co-counsel filed.

February 16, 1977 (USCA)—Petition for rehearing and suggestion for rehearing en banc filed.

March 9, 1977 (USCA)—Received from appellant letter clarifying citation of a case in the petition for rehearing.

March 28, 1977 (USCA)—Order denying petition for rehearing and the suggestion for rehearing en banc filed.

April 1, 1977 (USCA)—Appellant's motion for stay of mandate filed.

April 5, 1977 (USCA)—Appellees' memorandum in opposition to motion for stay of mandate filed.

April 8, 1977 (USCA)—Appellants' reply to memorandum in opposition to motion for stay of mandate filed.

April 12, 1977 (USCA)—Order staying issuance of mandate to April 27 filed.

April 18, 1977 (USCA)—Appellants' motion for extension of stay of mandate filed.

April 19, 1977 (USCA)—Appellees' memorandum in opposition to motion for extension of stay of mandate filed.

April 26, 1977 (USCA)—Received telephone call that case being docketed in the Supreme Court with No. 76-1484.

April 29, 1977 (USCA)—Received Supreme Court notice of filing of petition for certiorari on April 26, 1977, assigned No. 76-1484.

May 23, 1977 (USCA)—Received Supreme Court notice of filing of petition for certiorari on May 16, 1977, assigned No. 76-1600.

In the United States District Court
for the Northern District of California

Civil Action No. C-71 912 AJZ

The Stanford Daily, Felicity A. Barringer, Fred Mann, Edward H. Kohn, Richard Lee Greathouse, Robert Litterman, Hall Daily and Steven G. Ungar,

Plaintiffs,

vs.

James Zurcher, individually and as Chief of Police of the City of Palo Alto, County of Santa Clara, State of California, James Bonander, Paul Deisinger, Donald Martin, and Richard Peardon, all individually and as Police Officers of the City of Palo Alto, County of Santa Clara, State of California, Louis P. Bergna, individually and as District Attorney for the County of Santa Clara, State of California, Craig Brown, individually and as Deputy District Attorney for the County of Santa Clara, State of California, J. Barton Phelps, individually and as Judge of the Municipal Court of the Palo Alto-Mountain View Judicial District, Santa Clara County, State of California,

Defendants.

[Filed May 13, 1971]

CIVIL RIGHTS ACTION COMPLAINT

Jurisdiction

I.

This is an action pursuant to 42 U.S.C. §1983 to redress the deprivation, under color of state law, of rights secured to Plaintiffs by the First, Fourth and Fourteenth Amendments to the Constitution of the United States. Jurisdiction is conferred on this Court by 28 U.S.C. §1343.

Parties

II.

Plaintiff, *The Stanford Daily*, is an independent newspaper published by students at Stanford University, Santa Clara County, Stanford, California.

III.

Plaintiffs Felicity A. Barringer, Fred Mann, Edward H. Kohn, Richard Lee Greathouse, Robert Litterman, Hall Daily and Steven G. Ungar are officers or staff members of *The Stanford Daily*.

IV.

Defendant James Zurcher is Chief of Police of the City of Palo Alto, County of Santa Clara, State of California. Defendants James Bonander, Paul Deisinger, Donald Martin, and Richard Peardon are Palo Alto police officers under the command of Chief Zurcher.

V.

Defendant Louis P. Bergna is the District Attorney for the County of Santa Clara, State of California.

Defendant Craig Brown is a Deputy District Attorney for the County of Santa Clara, State of California.

VI.

Defendant J. Barton Phelps is Judge of the Municipal Court of the Palo Alto-Mountain View Judicial District, Santa Clara County, State of California.

Facts

VII.

The Stanford Daily is the only daily newspaper at the University. Its daily press run averages approximately 13,000 copies and its total readership is estimated at 20,000 persons. *The Stanford Daily* is an important source of news for its readers. Although its coverage includes national events, *The Stanford Daily's* primary focus is with news concerning Stanford University and the surrounding community. *The Daily* has provided continuing in-depth coverage of campus political activities of all descriptions, including meetings, speeches, rallies, demonstrations, confrontations and sit-ins.

VIII.

During the 1969-1970 academic year, *The Stanford Daily* found it increasingly difficult to cover some newsworthy events because participants were fearful that things said to, or observed or photographed by newsmen might ultimately end up in police files or somehow be used to prosecute them. Political demonstrators were often particularly apprehensive about

the presence of newspaper photographers at a demonstration, rally, or meeting held on campus. Photographers were in some instances, barred from wholly peaceful meetings. For example, on January 27, 1970 a campus group known as "The New Moratorium" excluded a photographer of *The Stanford Daily* from a room on the campus in which the group was meeting because of the fear that the pictures taken might be used to prosecute those in attendance. For the same reason, *Daily* photographers who were covering demonstrations were sometimes physically threatened or harassed by those participating in demonstrations on the Stanford campus. For example, during the protest against renewed American bombing in North Vietnam that took place in November of 1970, one photographer of *The Stanford Daily* was stopped by a crowd of people and forced to surrender his film.

IX.

Because of incidents like those described above, those responsible for the editorial policy of *The Stanford Daily* have for more than a year engaged in extensive consideration of the legal and professional obligations of the paper with respect to the possible use of materials and photographs in its files for purposes of law enforcement. During this time, members of *The Stanford Daily's* staff have consulted with experts in the field of journalism on the faculty of Stanford University and others actively engaged in the profession so that the complex factors bearing upon the appropriate policy might be fully consid-

ered. That analysis was and has been rendered more difficult because of the uncertainty of applicable legal principles.

X.

At all times, those engaged in the formulation of *The Stanford Daily's* policy were concerned with (1) the barriers to effective news gathering and reporting that a policy permitting disclosure of unpublished photographs or confidential materials would generate; and (2) the physical safety of *The Stanford Daily's* staff. On that basis, it adopted a policy that (1) *The Stanford Daily* would print any photograph which it considered newsworthy whether or not incriminating; and (2) no unpublished photographs or negatives would voluntarily be made available by *The Stanford Daily* to the police or other law enforcement officers. Further, it was decided that, until there had been a clear judicial determination that the police had no right to search for or compel production of materials and unpublished photographs of *The Stanford Daily*, the *Daily* and its staff would consider itself free in the absence of the service of a subpoena or other proper judicial process, to destroy any materials in its possession.

XI.

Based on the above photo policy, first announced in February of 1970, and the special rapport and trust that student demonstrators often felt towards *The Stanford Daily* staff, *The Stanford Daily's* reporters and photographers have been able to attend various meetings, closed to other news media, and to cover

various rallies and demonstrations in a way that would otherwise not have been possible.

XII.

At no time has *The Stanford Daily* destroyed any files, photographs, negatives or other materials in its possession following the service of a judicially authorized subpoena covering any such materials.

XIII.

On Thursday, April 8, 1971, a sit-in demonstration was commenced at the Stanford Hospital by a group of Stanford University students, employees of Stanford University, and other persons protesting the firing of a black hospital employee and the denial of tenure to a Chicano doctor by the Stanford Medical School faculty. This demonstration continued until the evening of Friday, April 9, 1971. At that time, a violent confrontation occurred between the Palo Alto police and certain demonstrators.

XIV.

A number of photographers were present at the hospital demonstration. *The Stanford Daily* had one photographer, Bill Cooke, covering the hospital demonstration. Newsworthy photographs taken by *The Stanford Daily's* photographer appeared in a special Sunday (April 11, 1971) edition of *The Stanford Daily*.

XV.

On April 12, 1971, the Defendant J. Barton Phelps issued a search warrant ordering the "immediate

search" of the offices of *Stanford Daily*. A copy of this warrant is Exhibit A to this Complaint. The warrant states:

In the Municipal Court of the
Palo Alto-Mountain View Judicial District,
County of Santa Clara,
State of California

SEARCH WARRANT

The People of the State of California

To any Peace Officer present
in the County of Santa Clara:

Proof, by affidavit, having been made before me this day by Richard Peardon that there is just, probable and reasonable cause for believing that:

Negatives and photographs and films, evidence material and relevant to the identity of the perpetrators of felonies, to wit, Battery on a Peace Officer and Assault with Deadly Weapon, will be located where described below.

You are therefore commanded, in the daytime, to make immediate search of the premises of *Stanford Daily*, consisting of offices and rooms within the Stokes Publications building, located at Stanford University, County of Santa Clara, State of California, for the personal property described as follows:

- 1) Negatives of films taken at Stanford University Hospital on the evening of April 9, 1971, showing the Sit-In at the Hospital and following events.
- 2) The film used while taking pictures at Stanford University Hospital on April

9, 1971, showing the Sit-In and following events.

- 3) Any pictures which display the events and occurrences at Stanford University Hospital on the evening of April 9, 1971.

and if you find the same or any part thereof, to hold such property in your possession under Calif. Penal Code Section 1536.

Given under my hand this 12th day of April A.D. 1971.

/s/ J. Barton Phelps
Judge of Municipal Court

RPH/eak

XVI.

The basis for the warrant described above was a single affidavit of Defendant Peardon, a copy of which is Exhibit B to this complaint. This affidavit states:

In the Municipal Court of the
Palo Alto-Mountain View Judicial District,
County of Santa Clara,
State of California

AFFIDAVIT IN SUPPORT OF SEARCH WARRANT

State of California
County of Santa Clara

Personally appeared before me on this 12th day of April, 1971, Richard Peardon who, on oath, makes complaint, and deposes and says that he has and there is just probable and reasonable cause to believe and he does believe that there is now in the possession of the *Stanford Daily*, and in the possession of its editor and staff members at the offices located within the Storke Publica-

tions building, Stanford University, County of Santa Clara, State of California, certain evidence of felonies, to wit, 243 and 245 of the Calif. Penal Code, described as follows:

- 1) Negatives of film taken at Stanford University Hospital the evening of April 9, 1971.
- 2) The film used while taking pictures at the Stanford University Hospital April 9, 1971.
- 3) Any pictures which display the events and occurrences at the Stanford University Hospital April 9, 1971.

Affiant Richard Peardon is an officer with the Palo Alto Police Department. He has had 21½ years experience in police work. Affiant is investigating the assaults with a deadly weapon and batteries on police officers which occurred April 9, 1971, at the Stanford University Hospital, Stanford, California, that evening.

Affiant personally observed officers of the Palo Alto Police Department who had been called to special duty at Stanford University Hospital struck by objects such as legs of chairs and sticks while attempting to control the crowds at the location. Affiant observed and does know their officers were on duty and in uniform at this time attempting to disperse an unlawful assembly and control the crowd. In addition, affiant was himself struck while defending himself after an order to disperse was given by Chief Anderson of the Palo Alto Police Department.

Affiant also personally observed objects including mental tape dispensers being thrown from inside the hospital doors in the direction of police

officers outside the hospital. During this period of time affiant personally observed pictures being taken of this activity from directly behind the Palo Alto officers. Affiant personally saw cameras being pointed in the direction of the officers and demonstrators during the course of the evening.

Affiant has seen pictures appearing in the *Stanford Daily* the morning of Sunday, April 11, 1971. He has examined these pictures and determined they depict the location, occurrences and activity during the period of time the felonies of assault on a police officer and assault with a deadly weapon were occurring. A copy of said *Stanford Daily* is attached hereto. Said photographs carry the byline of one Bill Cooke who is also listed on the masthead as a "photo labman" on the *Daily* staff.

Affiant has conversed with James Bonander, a detective of the Palo Alto Police Department, who has informed him that the offices in which the pictures and articles of the *Stanford Daily* are produced are located in the Storke Publications building at Stanford University, Stanford, California, from detective Bonander's personal knowledge and observation. The copy of the *Daily*, dated April 9, 1971, which is attached hereto also lists such building as the headquarters of the paper.

Therefore, affiant believes the pictures observed in the *Stanford Daily* April 12, 1971, as well as other film and negatives taken at that time and place will be located at the above described offices.

That based upon the above facts, your affiant prays that a search warrant be issued with re-

spect to the above location for the seizure of said evidence, and that the same be held under Section 1536 of the Penal Code and disposed of according to law.

[s] Richard Peardon
Richard Peardon

Subscribed and sworn to before
me this 12th day of April, 1971.

[s] J. Barton Phelps
Judge of the Municipal Court

RRH:gl

XVII.

Defendant Brown, Defendant Bergna, or attorneys under the control of Defendant Bergna participated in securing the warrant described above.

XVIII.

On Monday, April 12, at approximately 5:45 p.m., Defendants Bonander, Deisinger, Martin, and Peardon appeared at the offices of *The Stanford Daily* in the Stokes Publications building located on the Stanford University campus. After presenting the search warrant to a staff member of *The Stanford Daily*, these Defendant police officers proceeded to search *The Stanford Daily* offices.

XIX.

The Defendant police officers opened and intensively searched filing cabinets, and desks in the offices of *The Stanford Daily*. They looked at materials on table tops, shelves and desk tops, in waste baskets and cupboards in *The Stanford Daily's* offices.

XX.

Desks in the offices of *The Stanford Daily* that were searched contained rough notes taken by reporters at interviews conducted while gathering news for *The Stanford Daily*. Some of these reporters' notes contained information given in confidence, and on the express understanding that the name of the source would not be disclosed by the staff of *The Stanford Daily*. Because of the search, Defendant police officers were in the position to see these confidential reporters' notes.

XXI.

One or more of Defendant police officers saw, scanned, or read business correspondence of *The Stanford Daily* and personal correspondence of staff members of *The Stanford Daily* by reason of the search. One Defendant police officer searched through a desk drawer containing personal papers and property including a completed income tax return of Plaintiff Kohn.

XXII.

The Defendant police officers also searched through photographic files of *The Stanford Quad*. *The Stanford Quad* is the year book at Stanford University. *The Stanford Quad* is independent and unrelated to *The Stanford Daily*. The photographic files of *The Stanford Quad* were clearly labelled as such. The search of the photographic files of *The Stanford Quad* continued after a Defendant police officer was specifically told that the files in question belonged to *The Stanford Quad*.

XXIII.

After completing their search, the Defendant police officers accounced [sic] that they had not found what they were looking for, and had consequently seized nothing. The Defendant officers left *The Stanford Daily's* offices at approximately 6:30 p.m. The duration of the search was approximately 45 minutes.

XXIV.

Following the search, Plaintiff Robert Litterman spoke with Defendant James Zurcher on the telephone. Mr. Litterman identified himself as a staff member of *The Stanford Daily*, and protested the police search. Chief Zurcher told Litterman that search warrants could be used to search any area where items of evidentiary value might be stored. Chief Zurcher refused to give any assurance that similar searches would not be authorized by him in the future under similar circumstances.

XXV.

After the search, Plaintiff Robert Litterman spoke with Defendant Craig Brown, of the District Attorney's office. Plaintiff Litterman identified himself as a staff member of *The Stanford Daily*. Plaintiff Litterman protested the legality of the search that had taken place. District Attorney Brown said he had assisted in the preparation of the warrant and that the issuance of the warrant and subsequent search was entirely legal. He also said he could give Litterman no assurance that similar searches pursuant to war-

rants issued in the same manner would not take place in the future under similar circumstances.

XXVI.

Upon information and belief, the Defendants, or some of them, intend in the future to seek and issue similar warrants, and conduct similar searches, in similar circumstances.

XXVII.

Apprehension that the Defendants or some of them may again search *The Stanford Daily's* premises jeopardizes the ability of *The Stanford Daily* satisfactorily to cover newsworthy events. The threat of such searches: (1) causes persons participating in meetings, demonstrations and rallies to refuse necessary cooperation to *The Stanford Daily* reporters and photographers thereby making it impossible for them adequately to cover the events; (2) causes persons to refuse to give confidential information to *Stanford Daily* reporters lest such information be disclosed to the police; (3) causes *The Stanford Daily* photographers and reporters to engage in self-censorship in order to avoid producing materials which the police may wish to seize; and (4) renders *The Stanford Daily* unable to maintain notes, files and records, including photographic records, necessary for the fulfillment of *The Stanford Daily's* journalistic function for fear that possession of certain materials will cause the police again to search the offices of *The Stanford Daily*.

First Cause of Action

XXVIII.

Defendants' search of the offices of *The Stanford Daily* pursuant to the warrant was constitutionally invalid under the First, Fourth, and Fourteenth Amendments to the United States Constitution because it is unreasonable *per se* to use a search warrant as a means for securing evidence belonging to and in the exclusive possession of a person or organization, where there has not been demonstrated probable cause to believe that such person or organization has participated in the unlawful activity to which said search relates, particularly when the person or organization is engaged in news gathering and publishing activities themselves protected by the First Amendment.

Second Cause of Action

XXIX.

Defendants have violated Plaintiffs rights under the First, Fourth, and Fourteenth Amendments to the United States Constitution because Plaintiffs were given no opportunity for an adversary hearing prior to the issuance of the warrant and the search of *The Stanford Daily's* offices.

Third Cause of Action

XXX.

Defendants have violated Plaintiff's [sic] rights under the First, Fourth and Fourteenth Amendments to the United States Constitution because:

a. Such a search inhibits and violates the Constitutionally protected interests set forth in paragraph XXVII above; and

b. The police made no judicial showing prior to the search that (i) they lacked alternative sources for the information contained in the materials for which the search was sought; (ii) there was a compelling need for the materials sought; and (iii) the materials could not be obtained by a means less destructive of the freedom of the press protected by the First and Fourteenth Amendments.

Prayer

Wherefore, the Plaintiffs respectfully pray:

1. That the Court declare illegal and unconstitutional the search of the offices of *The Stanford Daily* that took place on April 12, 1971.

2. That the Court permanently enjoin and restrain Defendants, their agents, successors, employees, attorneys and those acting in concert with them or at their direction, from seeking the issuance of, issuing, or executing any warrant to search the offices of *The Stanford Daily*, or the office or residence of any of its staff members for any photographs, negatives, films, reporters' notes, documents or any other material, whether published or unpublished, taken, received, developed or maintained in the course of efforts to gather news, by any person who is a staff member of *The Stanford Daily*.

3. The Court order Defendants to pay Plaintiffs' for counsel fees and costs of suit.

4. That the Court order such relief as may seem just to the Court under the circumstances of this case.

Dated: May 13, 1971

Anthony G. Amsterdam
Jerome B. Falk, Jr.
Robert H. Mnookin
Attorneys for Plaintiffs,
By: Robert H. Mnookin
For attorneys for Plaintiffs

Exhibit "A"

In the Municipal Court for the
Palo Alto-Mountain View Judicial District,
County of Santa Clara,
State of California

[Apr. 21, 1971]

SEARCH WARRANT

The People of the State of California:

To any Peace Officer present
in the County of Santa Clara:

Proof, by affidavit, having been made before me this day by Richard Peardon that there is just, probable and reasonable cause for believing that:

Negatives and photographs and films, evidence material and relevant to the identity of the perpetrators of felonies, to wit, Battery on a Peace Officer and Assault with Deadly Weapon, will be located where described below.

You are therefore commanded, in the daytime, to make immediate search of the premises of *Stanford Daily*, consisting of offices and rooms within the Stokes Publications building, located at Stanford University, County of Santa Clara, State of California, for the personal property described as follows:

- 1) Negatives of films taken at Stanford University Hospital on the evening of April 9, 1971, showing the Sit-In at the Hospital and following events.
- 2) The film used while taking pictures at Stanford University Hospital on April 9, 1971, showing the Sit-In and following events.
- 3) Any pictures which display the events and occurrences at Stanford University Hospital on the evening of April 9, 1971

and if you find the same or any part thereof, to hold such property in your possession under Calif. Penal Code Section 1536.

Given under my hand this 12 day of April A.D. 1971.

[s] J. Barton Phelps
Judge of the Municipal Court

RRH/eak

Exhibit "B"

In the Municipal Court of the
Palo Alto-Mountain View Judicial District,
County of Santa Clara,
State of California

[Apr. 12, 1971]

AFFIDAVIT IN SUPPORT OF SEARCH WARRANT

State of California,
County of Santa Clara.

Personally appeared before me this 12th day of April, 1971, Richard Peardon who, on oath, makes complaint, and deposes and says that he has and there is just probable and reasonable cause to believe and he does believe that there is now in the possession of the *Stanford Daily*, and in the possession of its editor and staff members at the offices located within the Storke Publications building, Stanford University, County of Santa Clara, State of California, certain evidence of felonies, to wit, 243 and 245 of the Calif. Penal Code, described as follows:

- 1) Negatives of film taken at Stanford University Hospital the evening of April 9, 1971.
- 2) The film used while taking pictures at the Stanford University Hospital April 9, 1971.
- 3) Any pictures which display the events and occurrences at the Stanford University Hospital April 9, 1971.

Affiant Richard Peardon is an officer with the Palo Alto Police Department. He has had 21½ years experience in police work. Affiant is investigating the assaults with a deadly weapon and batteries on police officers which occurred April 9, 1971, at the Stanford University Hospital, Stanford, California, that evening.

Affiant personally observed officers of the Palo Alto Police Department who had been called to special duty at Stanford University Hospital struck by objects such as legs of chairs and sticks while attempting to control the crowds at that location. Affiant observed and does know their officers were on duty and in uniform at this time attempting to disperse an unlawful assembly and control the crowd. In addition, affiant was himself struck while defending himself after an order to disperse was given by Chief Anderson of the Palo Alto Police Department.

Affiant also personally observed objects including metal tape dispensers being thrown from inside the hospital doors in the direction of police officers outside the hospital. During this period of time affiant personally observed pictures being taken of this activity from directly behind the Palo Alto officers. Affiant personally saw cameras being pointed in the direction of the officers and demonstrators during the course of the evening.

Affiant has seen pictures appearing in the *Stanford Daily* the morning of Sunday, April 11, 1971. He has examined these pictures and determined they depict the location, occurrences and activity during the period of time the felonies of assault on a police officer

and assault with a deadly weapon were occurring. A copy of said *Stanford Daily* is attached hereto. Said photographs carry the byline of one Bill Cooke who is also listed on the masthead as a "photo labman" on the *Daily* staff.

Affiant has conversed with James Bonander, a detective of the Palo Alto Police Department, who has informed him that the offices in which the pictures and articles of the *Stanford Daily* are produced are located in the Storke Publications building at Stanford University, Stanford, California, from detective Bonander's personal knowledge and observation. The copy of the *Daily*, dated April 9, 1971, which is attached hereto also lists such building as the headquarters of the paper.

Therefore, affiant believes the pictures observed in the *Stanford Daily* April 12, 1971, as well as other film and negatives taken at that time and place will be located at the above described offices.

That based upon the above facts, your affiant prays that a search warrant be issued with respect to the above location for the seizure of said evidence, and that the same be held under Section 1536 of the Penal Code and disposed of according to law.

[s] Richard Peardon
Richard Peardon

Subscribed and sworn to before me
this 12th day of April, 1971.

[s] J. Barton Phelps
Judge of the Municipal Court

RRH:gl

In the United States District Court
for the Northern District of California

[Title Omitted in Printing]

[Filed Jun. 2, 1971]

ANSWER TO CIVIL RIGHTS ACTION
COMPLAINT; DEFENSES AND AFFIRMATIVE
DEFENSES

Defendant J. Barton Phelps, individually and as municipal court judge of the Palo Alto-Mountain View Judicial District and defendants Louis P. Bergna and Craig Brown, both individually and as District Attorney and Deputy District Attorney, respectively, all of the County of Santa Clara, State of California, for answer to the complaint allege:

1. In answer to the allegations of Paragraphs II, III, XIV, XVIII, XIX, XX, XXI, XXII, XXIII and XXIV allege that they are without knowledge or information sufficient to form a belief as to the truth of such allegations.

2. In answer to the allegations of Paragraphs V and VI, admit such allegations.

3. In answer to the allegations of Paragraphs I, VII, VIII, IX, X, XI, XII, XXV, XXVII, XXVIII, XXIX and XXX, deny each and every such allegation.

4. In answer to the allegations of Paragraph IV, admit that James Zurcher is Chief of Police of the City of Palo Alto, State of California, and as

to the other allegations of such paragraph, are without knowledge or information sufficient to form a belief as to the truth of such allegations.

5. In answer to the allegations of Paragraph XIII, admit that a violent confrontation occurred on or about the night of April 9, 1971 between officers of the Palo Alto police department and certain demonstrators at or about the Stanford University Hospital at a time when the Palo Alto police department was seeking to disburse an unlawful crowd and to control such crowd; as to the other allegations of such paragraphs, are without knowledge or information sufficient to form a belief as to the truth of such allegations.

6. In answer to the allegations of Paragraph XVII, admit that defendant Craig Brown, in his capacity as Deputy District Attorney, participated solely in the preparation of the affidavit and search warrant, as such documents are set out in the complaint on file herein; denies each and every such other allegation.

7. In answer to the allegations of Paragraph XV, admit that defendant J. Barton Phelps in his capacity as municipal court judge, issued the search warrant set out in the complaint on file herein; denies each and every such other allegation.

8. In answer to the allegations of Paragraph XVI, admit that the affidavit set forth in the complaint on file herein sets forth the facts tending to establish the grounds of the application, or probable

cause for believing that such grounds existed, for the issuance of the search warrant; deny each and every other such allegation.

9. In answer to the allegations of Paragraph XXVI, admit that the defendants Bergna, in his official capacity, and other persons in his office, including defendant Brown, in their official capacity, and that defendant Phelps, in his official capacity, will participate in the seeking of a search warrant and in the issuance of the same, in good faith and in accordance with the applicable provisions of the laws of the State of California, whenever there is reasonable cause to believe that there exists property or things to be seized which consist of any item or constitute any evidence which tends to show a felony has been committed, or tends to show that a particular person has committed a felony; denies each and every other such allegation.

Wherefore, defendants pray for judgment as hereinafter set forth.

*Defenses Under Rule 12(b) of Federal Rules
of Civil Procedure*

10. This court lacks jurisdiction over the subject matter for the reason that such jurisdiction lies only with a three judge federal court under the provisions of section 2281 of Title 28 of the United States Code.

11. This court lacks jurisdiction over the person in that defendants, and each of them, in that such jurisdiction lies only with a three judge federal court

under the provisions of section 2281 of Title 28 of the United States Code.

12. The complaint fails to state a claim against the defendants, and each of them, upon which a relief can be granted.

13. Stanford University has not been joined in this action and is a party which must be joined in this action under Rule 19 in that complete relief cannot be awarded among those already parties, as the Stanford Daily is an integral part of Stanford University.

14. That plaintiffs Felicity A. Barringer, Fred Mann, Edward H. Kohn, Richard Lee Greathouse, Robert Litterman, Hall Daily and Steven G. Ungar are not real parties in interest authorized to prosecute this action within the meaning of Rule 17 of Federal Rules of Civil Procedure.

15. That the Stanford Daily is not the real party in interest authorized to prosecute this action within the meaning of Rule 17 of Federal Rules of Civil Procedure.

Affirmative Defenses

16. That at all times mentioned in the complaint, defendants, and each of them, have acted only in good faith and upon probable cause and only in their official capacity, as distinguished from their individual capacity.

17. That no constitutional privilege exists, either under the Constitution of the United States or of the State of California, where the property or thing

sought to be seized consists of any item or constitutes any evidence which tends to show that a felony has been committed, or tends to show that a particular person has committed a felony, where such seizure is based upon a search warrant issued by a magistrate after a determination that probable cause exists for the issuance of such search warrant.

18. That a compelling interest or need exists to seize property or things consisting of any item or constituting any evidence which tends to show that a felony has been committed, or tends to show that a particular person has committed a felony, providing that it has been determined by a magistrate that probable cause exists for the issuance for a search warrant to cause such seizure.

19. That the Stanford Daily or any members of its staff do not so unequivocally enjoy such a sensitive news source or do not so unequivocally enjoy the trust and confidence of such a sensitive news source that the obtaining of property or things consisting of any item or constituting any evidence which tends to show that a felony has been committed, or tends to show that a particular person has committed a felony, providing that it has been determined by a magistrate that probable cause exists for the issuance of a search warrant to cause a seizure of such property or thing.

20. That this action seeks to restrain the enforcement, operation or execution of a state statute (Penal Code sections 1523 and following, relating to the issuance of search warrants) by restraining the action

of defendants Phelps, Bergna and Brown, being state officers, in the enforcement or execution of such state statutes and as such must be heard and determined by a three judge court.

21. That this action sets forth no grounds for federal intervention in that the courts of the State of California should first be allowed to hear and determine this matter.

22. That plaintiffs Felicity A. Barringer, Fred Mann, Edward H. Kohn, Richard Lee Greathouse, Robert Litterman, Hall Daily and Steven G. Ungar are not real parties in interest authorized to prosecute this action within the meaning of Rule 17 of Federal Rules of Civil Procedure.

23. That the Stanford Daily is not the real party in interest authorized to prosecute this action within the meaning of Rule 17 of Federal Rules of Civil Procedure.

24. That the Stanford Daily has no capacity to sue under section 1983 of Title 42 of the United States Code.

25. That defendants allege on the basis of information and belief that the plaintiffs, and each of them, lack legal capacity to maintain this action.

26. That plaintiffs, and each of them, lack standing to maintain this action in that the alleged deprivation of constitutional rights was suffered, according to the plaintiffs' own statements in the complaint herein, not by the plaintiffs, or any of them, but by a photographer alleged to be Bill Cook.

27. That Plaintiff Stanford Daily is not a "bona fide newspaper" nor a newsgathering agency.

28. That this action is prematurely brought and a cause of action is not stated in that there is no threat, immediate or otherwise, that the defendants, or any of them, will seek, issue, or execute a search warrant similar to the search warrant alleged in the complaint herein.

29. That this action is prematurely brought and the cause of action is not stated in that none of the plaintiffs have found it more difficult to cover news worth [sic] events as a result of the issuance of the search warrant alleged in the complaint herein.

30. That the plaintiffs, and each of them, have come before this court with "unclean hands" in that, according to their own allegations in the complaint herein under Paragraph X, the plaintiffs have followed a policy of not making photographs or negatives voluntarily available to the police or other law enforcement officers and of considering themselves free to destroy any materials in their possession, whether or not such materials constitute evidence that a felony has been committed or that a particular person has committed a felony, thereby forcing the defendants, and each of them, to seek a search warrant to obtain photographs or films of a public event which tend to show that a felony has been committed or tend to show that a particular person has committed a felony.

31. That this action is moot in that the search complained of has taken place, no evidence was seized as a result of such search, and there is no action pending or threatened against the plaintiffs, or any of them.

32. That the plaintiffs, and each of them, have failed to allege that they have complied with the claims procedure of the California Tort Claims Act.

Wherefore, defendants, and each of them, pray for judgment as follows:

1. That the court refuse to declare illegal and unconstitutional any search of the offices of the Stanford Daily that took place on or about April 12, 1971.

2. That the court refuse to permanently enjoin and restrain defendants, their agents, successors, employees, attorneys and those acting in concert with them or at their discretion, from seeking the issuance of, issuing, or executing any warrant to search the offices of the Stanford Daily, or the office or residence of any of its staff members for any photographs, negatives, films, reporters' notes, documents or any other material, whether published or unpublished, taken, received, developed or maintained in the course of efforts to gather news, by any person who is a staff member of the Stanford Daily.

3. That the court refuse to order defendants to pay plaintiffs for counsel fees and costs of suit.

4. That the court dismiss the complaint on file herein, or in the alternative, stay the proceeding in

this court until the courts of the State of California hear and determine this matter.

5. That the court order such other relief as may seem just to the court under the circumstances of this case.

Dated: June 2, 1971.

William M. Siegel,
County Counsel
Selby Brown, Jr.,
Chief Assistant Counsel

[s] Selby Brown, Jr.

In the United States District Court
for the Northern District of California

[Title Omitted In Printing]

[Filed Jun. 9, 1971]

ANSWER TO CIVIL RIGHTS ACTION COMPLAINT;

DEFENSES AND AFFIRMATIVE DEFENSES

Come now defendants James Zurcher, James Bon-
ander, Paul Deisinger, Donald Martin and Richard
Peardon and answer plaintiffs' complaint on file here-
in, and admit, deny and allege as follows:

I

Answering the allegations of paragraphs I, II, VII,
VIII, IX, XI, XII, XIX, XX, XXI, XXII, XXIV,
XXVI, XXVII, XXVIII, designated as First Cause

of Action, XXIX, designated as Second Cause of
Action, and XXX, designated as Third Cause of
Action, these answering defendants deny generally
and specifically, each and every, all and singular, the
allegations therein contained;

II

These answering defendants admit the allegations
of paragraphs IV, V, VI, XVIII and XXIII of said
complaint;

III

Answering the allegations of paragraphs III, XIV,
XVII and XXV, these answering defendants allege
that they do not have sufficient information or belief
to answer the allegations therein contained, and basing
their denial on such lack of information or belief,
deny generally and specifically, each and every, all
and singular, the allegations therein contained;

IV

Answering the allegations of paragraph X of said
complaint, these answering defendants admit that the
Stanford Daily would not voluntarily make unpub-
lished photographs or negatives available to the police
or other law enforcement officers, and further admit
that it was the policy of the *Stanford Daily* to destroy
any such materials in its possession, and other than
said admission, deny generally and specifically, each
and every, all and singular, the allegations contained
in said paragraph;

V

Answering the allegations of paragraph XIII of said complaint, these answering defendants admit there was a sit-in demonstration on April 8, 1971, and April 9, 1971, and further admit that the Palo Alto Police were attacked by demonstrators, and other than said admission, deny generally and specifically, each and every, all and singular, the allegations therein contained;

VI

Answering the allegations of paragraph XV of said complaint, these answering defendants admit that defendant J. Barton Phelps in his capacity as Municipal Court Judge, issued a search warrant as attached to said complaint, and other than said admission, deny generally and specifically, each and every, all and singular, the remaining allegations of said paragraph;

VII

Answering the allegations of paragraph XVI of said complaint, these answering defendants admit that the affidavit set forth in the complaint on file herein sets forth facts tending to establish the grounds of the application or probable cause for believing that such grounds existed for the issuance of a search warrant, and other than said admission, deny generally and specifically, each and every, all and singular, the remaining allegations of said paragraph.

Wherefore defendants pray for judgment as hereinafter set forth.

*Defenses Under Rule 12(b) of the Federal
Rules of Civil Procedure*

VIII

These answering defendants allege that this Court lacks jurisdiction over the subject matter of this action, for the reason that such jurisdiction lies only with the three judge federal court under the provisions of §2281 of Title 28 of the United States Code.

IX

These answering defendants allege that this Court lacks jurisdiction over the person of the defendants, and each of them, in that such jurisdiction lies only with a three judge federal court under the provisions of §2281 of Title 28 of the United States Code.

X

That this complaint and each of the causes of action therein contained, fails to state facts sufficient to constitute a claim or cause of action against these defendants or either of them, upon which the relief sought could be granted.

XI

These answering defendants allege that this Court has no jurisdiction over the subject matter of this action, in that this action seeks to restrain the enforcement, operation or execution of a state statute (Penal Code §1523 and other applicable sections relating to the issuance of search warrants) by restraining the action of defendants, and each of them, being state

officers, in the enforcement or execution of such state statutes and as such must be heard and determined by a three judge court.

As And For a Further and Distinct Affirmative Defense To Each and Every Allegation Contained in Plaintiffs' Complaint, These Answering Defendants Allege:

I

That at all times mentioned in plaintiffs' complaint, defendants, and each of them, acted only in good faith and upon probable cause and only in their official capacity, as distinguished from their individual capacity.

As And For a Second and Separate Affirmative Defense To Each and Every Allegation Contained in Plaintiffs' Complaint, These Answering Defendants Allege:

I

No constitutional privilege exists, either under the Constitution of the United States or of the State of California, where the property or thing sought to be seized consists of photographs and films of a public event which tends to show that a felony has been committed or tends to show that a particular person has committed a felony where such seizure is based upon a search warrant issued by a magistrate after determination that probable cause exists for the issuance of such search warrant.

As And For a Third, Separate and Distinct Affirmative Defense to Each and Every Allegation Con-

tained in Plaintiffs' Complaint, These Answering Defendants Allege:

I

That a compelling interest or need exists to seize property or things consisting of photographs or films of a public event which tends to show that a felony has been committed or tends to show that a particular person has committed a felony where it has been determined by a magistrate that probable cause exists for the issuance of a search warrant to cause such seizure.

As And For a Fourth, Separate and Distinct Affirmative Defense To Each and Every Allegation Contained in Plaintiffs' Complaint, These Answering Defendants Allege:

I

Neither the *Stanford Daily*, any members of its staff, nor any of the plaintiffs so unequivocally enjoy such a sensitive news source, nor so unequivocally enjoy the trust and confidence of such a sensitive news source that the obtaining of photographs or films of a public event which tends to show that a felony has been committed or tends to show that a particular person has committed a felony where it has been determined by a magistrate that probable cause exists for the issuance of a search warrant to cause a seizure of such property or thing violates any constitutionally protected right or privilege of said *Stanford Daily*, any members of its staff, or any of the plaintiffs.

As And For a Fifth, Separate and Distinct Affirmative Defense To Each and Every Allegation Contained in Plaintiffs' Complaint, These Answering Defendants Allege:

I

This action seeks to restrain the enforcement, operation or execution of a state statute (Penal Code §1523 and other applicable sections) relating to the issuance of search warrants, by restraining the action of the defendants, and each of them, being state officers, in the enforcement or execution of such state statutes and as such must be heard and determined by a three judge court.

As And For a Sixth, Separate and Distinct Affirmative Defense To Each and Every Allegation Contained in Plaintiffs' Complaint, These Answering Defendants Allege:

I

This action sets forth no grounds for federal intervention, and the Courts of the State of California should first be allowed to hear and determine this matter.

As And For a Seventh, Separate and Distinct Affirmative Defense To Each and Every Allegation Contained in Plaintiffs' Complaint, These Answering Defendants Allege:

I

That plaintiffs, and each of them, lack the legal capacity to maintain this action.

As And For An Eighth, Separate and Distinct Affirmative Defense To Each and Every Allegation Contained In Plaintiffs' Complaint, These Answering Defendants Allege:

I

That plaintiffs, and each of them, lack standing to maintain this action, in that the alleged deprivation of constitutional rights was suffered, according to plaintiffs own statements in the complaint on file herein, not by any of the plaintiffs, but by a photographer alleged to be Bill Cook.

As And For a Ninth, Separate and Distinct Affirmative Defense To Each and Every Allegation Contained in Plaintiffs' Complaint, These Answering Defendants Allege:

I

That plaintiff *Stanford Daily* is not a "bona fide newspaper" nor a news gathering agency.

As And For a Tenth, Separate and Distinct Affirmative Defense To Each and Every Allegation Contained in Plaintiffs' Complaint, These Answering Defendants Allege:

I

That this action is prematurely brought and a cause of action is not stated, in that there is no threat, immediate or otherwise, that the defendants, or any of them, will seek, issue or execute a search warrant similar to the search warrant alleged in the complaint herein.

As And For An Eleventh, Separate and Distinct Affirmative Defense To Each and Every Allegation Contained in Plaintiffs' Complaint, These Answering Defendants Allege:

I

That this action is prematurely brought and no cause of action is stated, in that plaintiffs, nor either of them, have found it more difficult to cover newsworthy events as a result of the issuance of the search warrant alleged in the complaint on file herein.

As And For a Twelfth, Separate and Distinct Affirmative Defense To Each and Every Allegation Contained in Plaintiffs' Complaint, These Answering Defendants Allege:

I

That plaintiffs, and each of them, have come before this Court with "unclean hands" in that, according to their own allegations contained in the complaint on file herein, under paragraph X, the plaintiffs have followed a policy of not making photographs or negatives voluntarily available to the police or other law enforcement officers and of considering themselves free to destroy any materials, or other evidence in their possession, whether or not such materials constitute evidence that a felony has been committed or that a particular person has committed a felony, thereby forcing defendants, and each of them, to seek a search warrant to obtain photographs or films of a public event which tend to show that a felony has been committed or tend to show that a particular person has committed a felony.

As And For a Thirteenth, Separate and Distinct Affirmative Defense To Each and Every Allegation Contained in Plaintiffs' Complaint, These Answering Defendants Allege:

I

That this action is moot in that the search complained of has taken place, no evidence was seized as a result of such search, and there is no action pending or threatened against the plaintiffs, or any of them.

As And For a Fourteenth, Separate and Distinct Affirmative Defense To Each and Every Allegation Contained in Plaintiffs' Complaint, These Answering Defendants Allege:

I

That plaintiffs' complaint on file herein, fails to state a cause of action against these defendants, or any of them, in that plaintiffs have failed to show that they have or are suffering irreparable damage.

As And For a Fifteenth, Separate and Distinct Affirmative Defense To Each and Every Allegation Contained in Plaintiffs' Complaint, These Answering Defendants Allege:

I

That plaintiffs' complaint on file herein, fails to state a cause of action against these defendants, or any of them, in that plaintiffs, by their own allegations are seeking relief on a question that has become moot.

As And For a Sixteenth, Separate and Distinct Affirmative Defense To Each and Every Allegation Contained in Plaintiffs' Complaint, These Answering Defendants Allege:

I

That plaintiffs' complaint on file herein fails to state a cause of action against these defendants, or any of them, in that said complaint seeks relief against these defendants based upon speculation that some unnamed persons, not in any way associated with these defendants, may at some unknown future time, commit certain acts or violations of law at this undetermined future time;

As And For a Seventeenth, Separate and Distinct Affirmative Defense To Each and Every Allegation Contained in Plaintiffs' Complaint, These Answering Defendants Allege:

I

That there is no showing that plaintiffs, or any of them, have exhausted their remedies in the State Courts;

As And For An Eighteenth, Separate and Distinct Affirmative Defense To Each and Every Allegation Contained in Plaintiffs' Complaint, These Answering Defendants Allege:

I

That the relief sought by plaintiffs, and each of them, is too broad, indefinite and vague for this Court to grant all or any part of the relief sought.

Wherefore, defendants, and each of them, pray for judgment as follows:

1. That this Court refuse to declare illegal and unconstitutional any search of the offices of the *Stanford Daily* that took place on or about April 12, 1971;

2. That the Court refuse to permanently enjoin and restrain defendants, their agents, successors, employees, attorneys, and those acting in concert with them or at their discretion, from seeking the issuance of, issuing, or executing any warrant to search the offices of the *Stanford Daily*, or the offices or residences of any of its staff members for any photographs, negatives, films, reporters' notes, documents or any other material, whether published or unpublished, taken, received, developed or maintained in the course of efforts to gather news, by any person who is a staff member of the *Stanford Daily*;

3. That the Court refuse to order defendants, or any of them, to pay plaintiffs for counsel fees or costs of suit;

4. That the Court dismiss the complaint on file herein, or in the alternative, stay the proceedings in this Court until the Courts of the State of California hear and determine this matter;

5. That defendants, and each of them, be awarded their costs of suit and attorney's fees, and for such other relief as may seem just to the court under the circumstances of this case.

Dated, June 8, 1971.

Peter G. Stone, Toff, Gordon & Royce
/s/ Melville A. Toff
Attorneys for Defendants

In the United States District Court
for the Northern District of California

[Title omitted in printing]

[Filed June 19, 1972]

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2. Frank P. Haven
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4. Douglas Kneeland
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In the United States District Court
for the Northern District of California

[Title omitted in printing]

AFFIDAVIT

State of New York
County of New York—ss

WALTER CRONKITE, being duly sworn, deposes
and says:

1. I am a correspondent with CBS News, a division of Columbia Broadcasting System, Inc. My principal assignment since April, 1962, has been as managing editor of the "CBS Evening News with Walter Cronkite", a thirty-minute television news report broadcast five nights each week by the CBS Television Network. In addition, I participate in other broadcasts, including frequent participation as "anchor man" in coverage of such events as space missions and national political conventions and elections. Prior to joining CBS in 1950, I was a reporter/correspondent with United Press International for eleven years covering the Western Front in World War II and the Nuremburg Trials and post-war Moscow.

2. My work involves the preparation, through reading and talking with news sources, of the considerable volume of material necessary for such extemporaneous broadcasts as political conventions, elections, and space missions, and for analytical broadcasts such as my daily radio broadcast. It also in-

volves participation in the determination of which stories should be covered on daily television news broadcasts and how they should be covered and participation in the selection of the news items to be broadcast and reading, correcting, and in some cases, rewriting those items. All of this work entails the exercise of editorial judgment based on an extensive background of information and ideas gathered from a wide variety of sources.

3. I am making this affidavit in support of plaintiffs' action to declare the search of the offices of *The Stanford Daily* on April 12, 1971, by the Palo Alto police to be illegal and unconstitutional and for a permanent injunction prohibiting such future search warrants under the color of law.

4. I have considered in my own mind the effect of the entry by the police, the FBI, or other investigating authorities pursuant to a search warrant on the premises of a functioning broadcast newsroom in which the task of gathering and producing news is being carried out. The consequences of such an occurrence would be total chaos in terms of the ability of the staff to produce honest professional news coverage. It is clear to me that the constitutional guarantee of the First Amendment was intended to prevent these consequences.

5. Broadcast news coverage, much like newspaper reporting, depends on the acquisition of facts, including those gained from confidential sources. Included in news material which is not broadcast, therefore,

is information obtained in confidence or under restrictive conditions from sources that would perhaps be of particular interest to the police, the FBI, or other governmental agencies. It has been my experience that exposure, for whatever reason, of such unpublished information would have the chilling effect of cutting off that source in the future. Further, once a practice has been established that threatens such exposure, the knowledge would have a chilling effect on all other sources which might prefer to remain anonymous. The resulting unavailability of such confidential informants would thus undermine professional news coverage by effectively limiting the available information on which journalism has always depended. While the potential of such a chilling effect is great when more common tools such as the subpoena power are used, the "fishing expedition" nature of a search warrant makes it a particularly dangerous threat.

6. Perhaps the most shocking aspect of *The Stanford Daily* search was the fact that the police were utilizing the offices of the *Daily* to determine the availability of evidence. The extension of the use of the news office from a news gathering function to an investigating agency of the authorities is terrifying. Professional news gathering facilities cannot be permitted to be used as evidence gathering agencies in either criminal or civil proceedings without losing all trace of the independence and integrity on which the journalistic profession is founded. Indeed, the prospects of such searches are particularly frightening

when one considers that radio and television stations are licensed by the Federal Government.

/s/ Walter Cronkite
Walter Cronkite

(Jurat omitted in printing)

—
In the United States District Court
for the Northern District of California

[Title omitted in printing]

AFFIDAVIT

State of California
County of Los Angeles—ss.

I, FRANK P. HAVEN, state under oath as follows:

1. I am the Managing Editor of the Los Angeles Times. I have held this position for twelve years and I have been a newspaper reporter and editor for in excess of forty years. My duties as Managing Editor essentially consist of overall responsibility for the local, national and foreign news coverage of the Los Angeles Times and the placement of the various news items within each edition of the newspaper.

2. Until a few years ago, the Los Angeles Times and its news gathering staff became involved in litigation between third parties, through the service of subpoenas or otherwise, on very rare occasions, something like two or three times a year. Even on these

rare occasions, the cases usually involved injury or damage to person or property and presented minor problems to our news gathering and reporting capabilities which were not difficult to resolve.

3. In recent years, as civil disorders and confrontations between the police and a wide variety of dissident groups became increasingly frequent, the efforts to entangle the press in these disputes and legal proceedings arising out of them have increased dramatically. To date, this entanglement has consisted of a number of subpoenas duces tecum served on behalf of prosecution and defense, seeking large-scale production of documents relating to a given event.

4. Such use of the subpoena power has not only raised serious operational threats to the ability of a newspaper to publish but strikes at the heart of our most vital freedoms—freedom of speech and press. Since much has been said and written about such consequences, I will only summarize them briefly as follows:

(a) If newspaper records, including those confidential in nature, can be readily obtained through use of the subpoena power, confidential sources of news will quickly evaporate and important information will no longer be available for the information of the public.

(b) To the extent that a newspaper, its personnel and files are used by defense or prosecution, the objective informational role of the newspaper is severely damaged, the credibility of the

newspaper is lost and it comes to be viewed as simply another agent of whichever side has chosen to involve the newspaper.

(c) The personal safety of news reporters is endangered; it is not unusual for newsmen to have their equipment destroyed or damaged and to be physically assaulted because they are viewed as informers.

(c) [sic] As newspapers, their personnel and records are ever increasingly subjected to the subpoena process, their ability to effectively function as a newspaper is impaired for a reporter cannot be out covering newsworthy events while he is tied up in litigation.

That these problems are of the utmost constitutional significance is evidenced by the fact that three cases involving such problems are now pending before the United States Supreme Court.

5. While the subpoena process raises the serious problems outlined above, and more, at least a newspaper receives advance notice of a subpoena and has time to resist through a motion to quash or other appropriate legal proceedings. The use of search warrant procedures, as in the *Stanford Daily* case, introduces an entirely new, and more invidious, threat to freedom of the press. Unlike the subpoena process, a newspaper has no opportunity to resist a search warrant. The newspaper first knows about it when the police present the warrant at the office of the newspa-

per, at which point the newspaper is confronted with the choice of violating a court order or opening its files notwithstanding the disastrous consequences.

6. The thorough disruption of day-to-day newspaper operations which would result from subjecting newspapers to the use of search warrant procedures is too obvious to require much elaboration. If law enforcement officers have the power to at any time appear at the office of a newspaper with a search warrant, systematically go through the files of a newspaper relating to a particular event, confiscating those materials which appear to suit their needs, at that point the precise, and often tight, time requirements in publishing a newspaper are disrupted, personnel are diverted from their duties, materials necessary to publish the paper may be taken, and, in a word, the ability, not to mention the constitutional right, of the newspaper to determine what will be published, and when, is put in serious jeopardy.

7. Over and above these operational problems are the constitutional problems outlined above in paragraph 4, all of which are raised in their most aggravated form. On the basis of my forty years of experience as a newspaper man, I can categorically state that if the use of the search warrant procedure against newspapers is not unequivocally declared unconstitutional, and if law enforcement agencies are able to suddenly appear at the office of a newspaper with a search warrant, and thereby become entitled to sift through the files of a newspaper concerning a

given event, summarily confiscating documents or photographs, freedom of the press, as we know it, will no longer exist.

/s/ Frank P. Haven
Frank P. Haven

(Jurat omitted in printing)

In the United States District Court
for the Northern District of California

[Title omitted in printing]

State of New York
County of New York—ss.:

DONALD D. HOLT, being duly sworn, deposes and says:

1. I am the News Editor of Newsweek, a weekly magazine of general circulation throughout the world. As such, I supervise the gathering of news from worldwide sources for Newsweek.

2. This affidavit is submitted in support of a motion for summary judgment by the plaintiffs in the above-entitled action.

3. I have been a member of the staff of Newsweek for nearly eight years. Before becoming News Editor, I was Chief of the Chicago Bureau of Newsweek for five years, in charge of Newsweek's news coverage of ten states. Before joining Newsweek in 1964, I was a newspaper reporter for six years—three years

with the Chicago Daily News and three with the Elmhurst, Illinois, Press, a suburban weekly. I am a graduate of Wheaton College in Illinois.

4. Throughout my career as a working newsman, I have always kept my own notes and other background documents and material confidential, both to protect my sources and to maintain my position of independence of any "side" of a newsworthy event.

5. During the past five years, I have found that the problem of maintaining such confidential records has become increasingly sensitive and difficult. For example, during the 1968 Democratic National Convention in Chicago, and its aftermath, as Newsweek's Chicago Bureau Chief I was besieged by various law enforcement agencies with requests and even subpoenas to produce unpublished information. We successfully resisted furnishing any such information. Had we complied, we would have lost all standing as an independent news medium and, for all practical purposes, would have become an arm of the law enforcement agencies.

6. As a working newsman for 14 years, I find the forced search of a news office, with or without a search warrant, both shocking and dismaying. This—or any—forced disclosure of confidential documents or the names of news sources to law enforcement agencies is, in my view, a serious curtailment of freedom of the press as protected by the First Amendment. I can state categorically that were I subject to any such search, or otherwise forced to make such disclosures,

my ability to continue gathering news to inform the public would be seriously impaired.

/s/ Donald D. Holt
Donald D. Holt

(Jurat omitted in printing)

In the United States District Court
for the Northern District of California

[Title Omitted In Printing]

AFFIDAVIT OF DOUGLAS E. KNEELAND
State of California
County of San Francisco—ss.

DOUGLAS E. KNEELAND, being duly sworn, deposes and says:

1. I am the roving national correspondent of The New York Times, a position I have held for nineteen months. Prior to that, I was deputy national editor of The Times for fifteen months and midwestern correspondent for slightly more than two years. For the preceding eight years, I was an editor on various news desks of The Times in New York, including the foreign and metropolitan desks. Before joining The Times, I was an editor and reported for The Bangor (Maine) Daily News, The Worcester (Massachusetts) Telegram and The Lorain (Ohio) Journal. I have been a full time journalist for the last twenty years and have had broad experience as a reporter and an editor.

2. I submit this affidavit in support of the motion of the plaintiffs for summary judgment that the search of the Stanford Daily on April 12, 1971 be declared illegal and unconstitutional. As a working newsman, I am vitally concerned that nothing be allowed to interfere with the freedom and integrity of the press or with its members in the performance of their role as the public's eyes and ears at all newsworthy events. If the legality of the April 12 search is upheld, I see no way that any newspaper office in this country or even the very homes of reporters, photographers and editors will be safe from official intrusion.

3. The effect of such a search on a newspaper's ability to fulfill its news gathering function is difficult to overstate. In fact, it is hard to imagine the harmful impact that it could have, because to my knowledge never before in the history of American journalism has a similar search taken place. In our society, newspapers do not exist at the whim of any government, national, state or local. They are not an arm of those governments. Potential news sources know that, as the government should. The knowledge that as a reporter I am independent, and will not be a voluntary agent for any government, provides the basis of a trust without which I could not function effectively. News sources, sometimes within government itself, know that confidential information, which frequently is vital to my understanding of other facts in context, will be treated confidentially. They know that I am functioning as a fair, objective and independent observer, and that I am not taking sides, for or against them, in any conflict in which they are

involved. Many times they hope I will take their side, but I rely on my reputation for fairness, objectivity, and my ability to keep confidences to generate the trust and respect of my sources.

4. If the government is permitted to search newspaper offices or even the homes of newsmen for unpublished photographs, notes, tape recordings or other materials, that trust essential to gathering the news will be effectively destroyed. Because no official has any way of definitely knowing what pictures a photographer has taken or what notes a reporter has jotted in his notebook, such a search smacks of a fishing expedition. And by prowling through a reporter's notebooks or a photographer's files or by rifling their desks, officials will often have access to much material that interests them even though it was outside the material that originally motivated them. At best they will have turned the newsman into an unwilling investigator and at worst into a government spy who reveals confidences. Such a development will not escape the notice of potential news sources, whose trust is based in part at least on the long and honorable tradition of the profession. It will matter not that the newspaper or the individual newsman is an unwilling accomplice of the government. An accomplice he will be, his hardwon reputation for independence shattered. Doors will be closed. And the public will be deprived of much that it has the need and right to know.

5. In my own case, I work frequently at home. I have my files there. I save my notes and other ma-

terials for future reference. Often I will mark a section in a notebook that is confidential or not for attribution. I keep names, home addresses and telephone numbers of sources. Some of these are confidential at their request. My own ability to function as a reporter would be severely impaired if some of these sources believed that I could not keep my given word that I would treat confidentially materials that they entrusted to be or information that they imparted to me—that anything in my possession was subject to a possible government search. The more sophisticated sources know that newsmen may be subject to subpoena; but they also know that recent court opinions provide a basis for lawful challenge to subpoenas. On the other hand the intrusion of a search is indiscriminate; its scope and propriety cannot be judicially tested in advance; and the mere possibility of its use renders vulnerable all confidential materials.

6. During my twenty years in the newspaper business, I have dealt with many matters that required confidentiality, a sensitivity toward the news source's fear of exposure or, at least, the winning of his trust. I have been involved in investigations of the police and of official corruption, for instance. Such investigations are usually conducted with the cooperation of concerned members of the police department or government body. If a police search of my office, my home, my files—instigated perhaps by the very people being investigated—were a real threat, I know I could not have gathered much of the material essential to

stories I have written. I have also covered riots in the cities and other protest activities where it sometimes was necessary to have the confidence of militant blacks, a difficult enough task for any white reporter; an impossible one if it was felt that I was an investigative arm, albeit an unwilling one, of the government. I have written of the radicals in this country both on college campuses and off, in such branches as the G. I. Movement. Moving from one radical group to the next and establishing oneself as a reporter is a ticklish task. Almost no new encounter is without its challenges. No matter whose auspices a reporter appears under there are nearly always some members of a group who are fearful and distrustful to the point where some would describe them as paranoid. If the information gathered, the names of members, addresses, telephone numbers, many of these things given in confidence, were only a search warrant away from any government official, there would be no way that I could have done my job as a reporter.

7. My experience as a reporter and editor had led me to feel strongly that photographs are an important part of the coverage of such events as demonstrations and riots, conveying to the reader the visual impact of what has taken place. Photographers already provide this coverage at great personal risk, considering the volatility of such situations. In many instances that I have witnessed, especially at protest demonstrations or riots, they are in particular danger. Their equipment alone makes them highly visible and a common police practice of having their own photographers

pose as newsmen frequently makes anyone with a camera suspect in the eyes of political activists. If added to this were the knowledge that the police might have easy access to the unpublished film of legitimate news photographers, their position, I believe, would become untenable and their ability to cover such events jeopardized.

8. In sum, I am deeply certain, from my own experience, that a search such as that permitted in the offices of the Stanford Daily, allowed to stand, will do irreparable damage to the free press of this nation. If that happens, it will be the American public, whom newspapers and newsmen serve, that will be most severely deprived.

/s/ Douglas E. Kneeland
Douglas E. Kneeland

(Jurat omitted in printing)

In the United States District Court
for the Northern District of California

[Title Omitted In Printing]

AFFIDAVIT OF EDWARD H. KOHN
State of California
County of San Francisco—ss.

EDWARD H. KOHN, being duly sworn, deposes and says:

1. My name is Edward H. Kohn. I am an undergraduate student at Stanford University. I am Man-

aging Editor of *The Stanford Daily* (hereinafter referred to as "*Daily*" or "*The Daily*"), a member of the News Committee of the Associated Press Managing Editors Association, and a stringer (part-time correspondent) for *The Washington Post*.

2. At 5:30 P.M. on April 12, 1971, I was sitting in the Editor's portion of the *Daily* newsroom, located in the Storke Student Publications building on the Stanford University campus. At that time I was a staff member of the *Daily*.

3. Between 5:45 and 5:50 P.M. on that date, I became aware of a disturbance at the front of the office near the front door.

4. Between 5:45 and 5:50 P.M. on that date, Ralph Kostant, a staff member of the *Daily*, advised me to come to the door, saying that "there are some men here who want to 'speak with somebody in charge.'"

5. I turned around, and I observed two men, whom I thought were policemen.

6. As I approached the door, one man carrying what appeared to be a clipboard asked me if I was "in charge" of the office. I replied that I was not, and that I was not the editor but only a staff member and that only the editor could really be in charge of an office.

7. This man then displayed what he said was a search warrant and said he wanted to search the office. I asked him to hold the warrant steady for a moment, and he did so, saying that I would get a carbon of the document.

8. At this point, another student in the office went to call an attorney and to get ahold of Felicity Barringer, the editor.

9. I then read through the search warrant. At that time, I saw no way to prevent a search of the office, and I did not resist or interfere with the officers' subsequent search.

10. I asked the officers—there were six at this point, four from the Palo Alto Police Department and two from the Stanford Police Department, with three of the Palo Alto Police Department officers in plainclothes and the remainder of the officers in uniforms—to wait for a moment while I continued to attempt to contact the editor, Felicity Barringer.

11. I talked briefly with a lawyer, and he told me that there was nothing I could do to stop the search if the warrant appeared legal. I replied that it did, and he (Wolpman) said that he would be right over.

12. At this point, Kostant said that he could not contact Felicity—she was in a class and couldn't be reached.

13. I then attempted to contact Presidential Legal Advisor James V. Siena.

14. I then returned to the door, told the officer that I could not contact the editor, and he informed me that he was "going to go ahead and search anyway." I replied that there appeared to be nothing that I could do to stop him, and offered to explain the layout of the office in the hopes of preventing him from searching the Stanford "*Quad*" offices, which share part of a darkroom facility with the *Daily*.

15. This officer ignored me, and I followed him down to the photo lab. When I entered the lab, I noticed that another detective had already begun to search. At this time, the second detective was searching through a waste box located in the *Daily* darkroom. The other officer began to go through, drawer by drawer, negative by negative, print by print, contact sheet by contact sheet, the "*Quad*" files, which are located in a shared area of the darkroom.

16. I asked other *Daily* staffers to watch the policemen.

17. I then returned to the darkroom, where the two detectives were still going through the *Daily* darkroom and the "*Quad*" files.

18. I then went into the Business Office for the purpose of calling Siena again—there were no free phone lines in the *Daily* office proper. At that time there were no officers in the Business Office.

19. I made the rounds of the offices again—the darkroom, the News Office, my office, the hallway outside the door, to make sure that *Daily* people were watching all phases of the search.

20. I then returned to the Business Office to use the phone again. This time, I noted that two officers were going through the papers located on top of the filing cabinets near the corner of the room near the Addressograph office. One of them asked me what was in the locked file cabinet, and I replied that there were only back copies of the paper. While in the Business Office, I also observed the search of three

desks, including the one belonging to Brian Hardy, Business Manager, and those used by some of the ad salespeople. I observed the officers open all the desk drawers that were unlocked, and search through the materials inside. In numerous instances, the officers appeared to be reading the material they were going through.

21. At about 6:20 P.M. while I was sitting behind Felicity Barringer's desk, an officer of the Palo Alto Police Department approached and indicated he wanted to search Felicity Barringer's desk. This officer went through Barringer's desk, and I saw him noticeably pause to read certain pieces of correspondence that were clearly visible to me.

22. I observed this same officer also search through other desks including the one belonging to Fred Mann, Managing Editor.

23. At approximately 6:30 P.M. the five remaining officers left the premises.

24. I also had a desk in the *Daily* newsroom. After the search, I went to my desk, and I could see that it too had been searched because things had been rearranged. At this time, in my top desk drawer, was a Xerox of my complete 1970 income tax returns.

25. As a reporter for *The Stanford Daily*, I was present at the demonstrations that took place at the Stanford Hospital on April 8, 1971 and April 9, 1971. On April 9, at the demonstration, I specifically recall seeing two uniformed Palo Alto police officers actively operating a video tape machine filming the demon-

stration. At the same demonstration, I recall seeing several other photographers. One was a stout gentleman from the *San Jose Mercury* who went into the corridor of the hospital with the second wave of policemen and sheriff's deputies. Another was Chuck Painter of the Stanford University News Service. A third was a photographer from the *Palo Alto Times*. I also recall seeing a photographer who said he was from the Associated Press.

26. As a reporter for *The Stanford Daily*, I have covered many student demonstrations. I specifically recall observing on several occasions police photographers at these demonstrations on the Stanford University campus. In particular, I recall seeing police photographers at the anti-Pompidou demonstration at the Stanford Linear Accelerator Center (SLAC) on February 27, 1970; at the two demonstrations at the Athletic Department ROTC Building during April, 1970; and during the April 21, 1972 day-long demonstration following the renewed bombing of Viet Nam. In addition, as I noted above, I also recall seeing police photographers at the Stanford Hospital demonstrations that took place in April, 1971.

27. It is impossible for any newspaper or any other communications medium to effectively gather and accurately and objectively to report the news if it is subject to, or threatened by, police intimidation, harrassment, and/or search. This is particularly true for student-run college newspapers because of their traditional, albeit inaccurate, characterization as sec-

ond rate newspapers. Thinking that their reporters and photographers are less respected by police, therefore more subject to police interference, editors may refrain from making certain assignments, for fear that the fruits of the reporter's or photographer's efforts may be obtained by police agencies.

28. Threat of police interference also makes it difficult to work with persons who, for one reason or another, may desire anonymity [sic] or partial attribution. The student reporters feel threatened; they think that the police are less hesitant to use the work product of student reporters than the work product of older reporters and they resent doing the police department's work—willingly or unwillingly.

Executed this 9th day of June, 1972 at San Francisco, California.

/s/ Edward H. Kohn
Edward H. Kohn

(Jurat omitted in printing)

In the United States District Court
for the Northern District of California

[Title Omitted In Printing]

AFFIDAVIT OF CHARLES LYLE

CHARLES LYLE, being duly sworn, deposes and says:

1. This fall I will be a Junior at Stanford University, majoring in Communications. I have been a

photographer for the Stanford Daily since February of 1971. I have worked steadily for the Daily since, and was "promoted" to Photo Editor in September (autumn quarter) of 1971. I presently hold that position. I have, in this period, covered most of the major demonstrations that involved the Stanford campus or Stanford students.

2. The Computer Center demonstration which took place in February of 1971, was my second assignment for the Daily, and at that time, I was unaware of the radical's feelings towards photographers, and how difficult it was to cover demonstrations. I entered the Computation Center building that was being held by the demonstrators, with the intent of taking photos. When I raised my camera to my eye to take a light reading, I was told by a demonstrator that I would have to leave, since I had a camera.

3. I also covered the demonstrations at the Medical Center on April 8 as a Daily photographer. At first I was able to photograph pictures of the occupation of the lounge. When I returned later that night, the demonstrators had decided to sit-in for the night. Upon pulling my cameras out, I was told that no photographs would be taken, and that this policy had been decided earlier, as they didn't want photographs to be used against them. I was not present at the Medical Center on April 9 when the violence occurred between the police and the demonstrators.

4. Since the search of the Daily, as Photo Editor, I have had staff photographers refuse to cover dem-

onstrations for fear of injury to either their persons or their equipment.

5. Since the search I have covered many demonstrations and rallies [sic] for the Daily. Many Stanford radicals realized that I am a Daily photographer, and that it is our policy not to turn over to the authorities our photographs. Still, they are very sensitive about having their pictures taken. I find therefore, that I must use a great deal of discretion when taking photos of radicals. For example, I do not as a general rule, shoot pictures of crowd scenes showing their faces when they're milling round, in part because such pictures are rarely newsworthy, but also because I fear the authorities might try to forcibly obtain the photos, and thus jeopardize the Daily's ability to cover such events.

Signed this 18th day of June, 1972.

/s/ Charles E. Lyle
Charles E. Lyle

(Jurat omitted in printing)

In the United States District Court
for the Northern District of California

[Title Omitted In Printing]

AFFIDAVIT OF FRED MANN

FRED MANN, being duly sworn, deposes and says:

1. I have worked on the Stanford Daily since the fall of 1968, first as a sports writer, later as a sports

editor, editorial board member, and general reporter. From January of 1971 through June of 1971 I was managing editor of the Stanford Daily, and from September of 1971 through January of 1972 I was Editor of the paper. At the present time I am a staff member for the Daily and a member of the editorial board. For the past year I have spent an average of forty hours a week working for the Stanford Daily. I plan to make a career in journalism, and I have been a Communications major at Stanford University.

2. The Stanford Daily is an unincorporated association consisting of Stanford University students who produce the newspaper known as the Stanford Daily.

3. The offices of the Daily are located in the Storke Student Publications Building on the main campus of Stanford University.

4. During the autumn, winter and spring quarters of the academic year (late September through the middle of June), the Stanford Daily is published five days a week, Monday through Friday. During the summer quarter (middle of June through August), the Stanford Daily is published twice a week. The Stanford Daily's average daily press run for the 1970-71 regular academic year (September, 1970 through June, 1971) was approximately 13,000 copies. For 1971-72, the average daily press run was 15,000. The daily readership for 1970-71 was approximately 20,000 persons, and it is estimated that the readership at the present time exceeds that for the 1970-71 academic year.

5. The editorial contents of the paper and the duties of the editorial staff are controlled and supervised by a student Editor. The Editor is elected by the entire editorial staff and part of the business staff of the Stanford Daily every January and May. The editorial policy of the paper is controlled by a board known as the Editorial Board. This Board is composed of staff members who are selected by the Editor at the beginning of his or her term. The membership of the Editorial Board is subject to alteration at any time by the Editor.

6. A breakdown of the sources of revenue of the Stanford Daily is shown in Exhibit A, which is incorporated herein. The business affairs of the Stanford Daily, including the determination of advertising rates, and the level of staff salaries, are under the direct control of the Business Manager. The Stanford Daily has its own checking and savings accounts, monies from which to be drawn by the Business Manager. The Stanford Daily keeps its own books.

7. During the past three years, the Stanford Daily has paid small salaries to its staff members. Staff members do not receive academic credit from Stanford University for their work on the Stanford Daily.

8. The Stanford Daily Publishing Board is a seven man board with the following composition: the Editor and the Business Manager of the Stanford Daily; two students representing Student Senate of the Associated Students of Stanford University (A.S.S.U.); the A.S.S.U. Student Financial Manager; and two

non-students from the University community. The Stanford Daily Publishing Board periodically reviews the financial condition of the paper. It also supervises the election of the editor by the editorial staff. The Stanford Daily Publishing Board does not make the business or editorial policy decisions of the paper. During the academic year 1970-71, the board met no more than 6 times. During 1971-72, the Board did not meet at all.

9. Student publications at Stanford University, including the Stanford Daily, are represented on and subject to the A.S.S.U. Publications Board. A true copy of the current bylaws of the A.S.S.U. Publications Board, found in Article VI, § 6.09 of the Constitution and Bylaws of the Associated Students of Stanford University, is Exhibit B to this stipulation, and incorporated herein. The A.S.S.U. Publications Board is responsible for settling disputes between various publications, and overseeing the use and maintenance and the Storke Student Publications Building, in which the Stanford Daily, like other student publications, has offices. However, the A.S.S.U. Publications Board has no power to displace the Stanford Daily from its offices as long as it continues to publish and operate the newspaper. Neither the A.S.S.U. nor the A.S.S.U. Publications Board exercises financial or editorial control of the Stanford Daily.

10. The Stanford Daily itself presently has no official bylaws. The Stanford Daily Publishing Board did have bylaws, a copy of which is attached as Exhibit C to this stipulation, that were adopted

pursuant to the now repealed 1968 Constitution of the A.S.S.U. A new Constitution was approved by the Stanford Student Body in 1970, but bylaws pursuant to the current Constitution have not yet been adopted.

11. Neither Stanford University, nor any of its officers, control or supervise the editorial policy of the Stanford Daily or its financial management. I know of no written document nor any policy or agreement that indicates that Stanford University or its Board of Trustees has control over such policies of the Stanford Daily. The only money payment from Stanford University to the Stanford Daily is that amount paid by the University for faculty and staff subscriptions to the Stanford Daily. As is shown in Exhibit A, for the academic year 1970-71, this amount was \$18,000 and constituted approximately 10% of the total revenue of the Stanford Daily.

12. The Stanford Daily publishes news covering Stanford University, the surrounding community and other matters. The Stanford Daily has provided continuing coverage of campus political activities of all descriptions, including meetings, speeches, rallies, demonstrations, confrontations and sit-ins.

13. Plaintiffs Felicity A. Barringer, Edward H. Kohn, Richard Lee Greathouse, Robert Litterman, Hall Daily, Steven G. Unger and I were officers or staff members of the Stanford Daily at the time of the search of the Daily's offices on April 12, 1971.

14. Plaintiffs Edward H. Kohn, Robert Litterman, Hall Daily and I are now staff members of the Stanford Daily.

15. The sit-in demonstrations that began at the Stanford University Hospital on Thursday, April 8, 1971 and continued until the evening of Friday, April 9, 1971.

16. The Stanford Daily had two photographers, Bill Cooke and Charles Lyle assigned to cover the events at the hospital. Each had been a staff photographer for the Stanford Daily for more than six months.

17. Photographs of the demonstration taken by the Stanford Daily's photographer, Bill Cooke, appeared in a special Sunday (April 11, 1971) edition of the Daily, a copy of which is attached as Exhibit D.

18. To my knowledge at the time of the search, there was no evidence and defendants had no evidence tending to show that the Stanford Daily, its staff, or any of the plaintiffs in this case were in any personally involved in any unlawful acts at the demonstration and ensuing violence at the Stanford University Hospital.

19. The two editorials attached as Exhibits E and F are true copies of editorials printed in the Stanford Daily on the dates shown thereon.

20. Although in the absence of the service of a subpoena the Daily considers itself free to dispose of or destroy any of its property, including unpublished materials or photographs, it is the policy of the Daily not to destroy any material covered by a judicially authorized subpoena and, to my knowledge, no such destruction has ever occurred.

21. During my tenure on the Daily, it has been the policy of the Daily to choose photographs for publication solely on the basis of newsworthiness and without regard to whether the photographs might be incriminating to the persons depicted therein. The Daily in fact publishes photographs that might be thought to be potentially incriminating. Without being exhaustive, the photographs published on the following dates (while I was either Managing Editor or Editor), were potentially incriminating:

February 1, 1971—page 1—Picture of a student being physically lofted over a crowd into a "closed" judicial hearing room by supporters of the defendants on trial. She was threatened with punishment.

May 6, 1971—page 1—Prof. Robert McAfee Brown blocking the entrance to the San Mateo County draft board building in protest of the war.

May 12, 1971—page 1—B. Davey Napier, Dean of the Stanford Chapel, similarly blocking the draft board doors.

May 17, 1971—page 1—Destruction in the student union drug store after an attack by vandals.

September 27, 1971—page 1—A picture of the People's Park confrontation in Berkeley last year.

September 28, 1971—page 1—Bruce Franklin arguing with Lt. Don Tamm of the Santa Clara Sheriff's Dept. at the Stanford Computer Center on the day of the violence there. Franklin obviously, was already in trouble over the incident, but those in the background have been tried under campus judicial proceedings, if identified.

October 12, 1971—page 1—demonstrations at the Franklin hearings. Again, possible prosecution under campus rules.

October 19, 1971—page 1—Demonstration and disruption of a Hoover Institute conference on Iran by Iranian students and radicals.

October 28, 1971—page 1—Franklin, Tamm, and crowd at Comp. Center.

November 4, 1971—page 1—Occupation of the campus Placement Center by radicals. Numerous charges have been filed against the disruptors for this incident.

November 5, 1971—page 1—Same as the day before, but a different picture.

November 8, 1971—page 1—Group of fans tearing down the football goal posts following the clinching of the Rose Bowl bid. The police did try to stop people from doing it, and two warnings were given before the game ended.

November 9, 1971—page 3—Demonstrations at the Franklin hearings.

January 17, 1972—page 1—Placement Center demonstration, inside the building.

January 18, 1972—page 6—Franklin teaching a class after being found guilty by Advisory Board—a violation of at least the spirit of the decision, if not the letter. It was felt the University could have taken additional action against him.

January 20, 1972—page 1—Demonstration and sit-in in the President's office.

January 24, 1972—page 5—Demonstration in San Francisco outside the Trustees' meeting firing Franklin. Arrests were made.

January 25, 1972—page 6—Franklin in the Faculty at an "eat-in." Campus judicial proceedings were brought against some in this demonstration.

January 27, 1972—page 1—Two pictures of the Placement Center demonstrations.

22. Although occasionally our photographers have been intimidated and even shoved around, the policy of letting it be known that we would not allow the Daily to become an investigative arm of the police has provided us with closer access to demonstrators and others making the news. We hold more of a position of trust among radical groups than papers from off campus, and as a result have been able to cover news of their actions more closely and more accurately than any of the other media in the area. As Daily editorials indicate, we often differ with revolutionary actions, but we give them coverage that they find the least biased of any medium.

23. The importance of photographs to our news coverage is undeniable. For any newspaper, a story of action is not complete with words alone. The camera can often catch truth more easily than can the written word. No description of a beating or a fire can match the actual sight of the action through a picture. Readers expect photo coverage of events, and the Daily has been fortunate to have excellent people taking pictures and presenting a well-rounded account of protests and demonstrations.

24. The Daily cannot operate under pressure from outside forces, be they radical groups, minority group demands, or interference from government and

police. The search of the Daily offices by Palo Alto police disrupted activity here for the following four days with emergency editorial board meetings, numerous calls and letters, and at least four TV interview-camera teams invading the office. People were placed under a great strain, the editor was tied up day and night with related incidents, and the entire paper suffered. We were overtime on our press deadline, and we raised the ire of the type setting shop for our late hours and poor organization.

25. The search was disruptive in another sense also. At the time of the April 12, 1971 search, as a Managing Editor, I had a desk in the Daily's office. In my desk, I kept my notes from various interviews I had made with news sources. Some of the information in these notes had been given to me in confidence, and on the express understanding that I would reveal neither the source nor the information. Confidential information and confidential sources are of great importance in terms of my ability to function as a reporter—they often provide the background information essential to effective reporting. If sources thought confidential information would be made available to the police, they certainly wouldn't give me such information, and my ability to function as a reporter would be diminished. The search of the Daily's office, and the threat of its repetition—with the possibility of police access to information given in confidence—puts in jeopardy our newspaper's capacity to gather and report the news.

26. Furthermore, a paper loses all credibility when it acts or is compelled to act in the express interests

of one group against another. The ideal of objectivity may be a myth, but the struggle to reach that idealistic goal is imperative for all papers from the New York Times to any college paper. In addition, the readers of the Daily are basically liberal and many of them would and do object to the official campus newspaper operating as an "evidence organ" for the police in a controversial case of human rights. Whether the demonstrators at the Stanford Hospital or any other site were right or wrong in their protest is not the point; the Daily attempts to cover the story and present as clear a picture as possible. We do not attempt to "bring Law-breakers to justice" through our news coverage, although at times we might editorially think that that should be done. Any interference with the Daily's operation and its organizational philosophy truly cripples the newspaper as an effective and unbiased disseminator of information.

Executed this 16th day of June, 1972.

/s/ Fred Mann
Fred Mann

(Jurat omitted in printing)

Exhibit A

**THE STANFORD DAILY
BREAKDOWN OF INCOME**

	1969-70	1970-71		
	<u>1969-70</u>	<u>Percentage</u>	<u>1970-71</u>	<u>Percentage</u>
ADVERTISING INCOME:				
National	19,970	15%	17,815	10%
Local	68,890	51%	76,723	44%
Classified	12,358	12%	18,310	10%
Sub-Total	\$ 101,218	78%	\$ 112,848	64%
SUBSCRIPTION INCOME:				
Student Subs.	27,641	20%	35,883	20%
Faculty-Staff Subs.	0	0	18,000	10%
Off-Campus Subs.	5,688	.75%	5,869	3%
Sub-Total	33,329	20.75%	59,752	33%
OTHER INCOME:	681	.25%	3,587	3%
Sub-Total	\$ 681	.25%	\$ 3,587	3%
TOTALS	<u>\$ 135,228</u>	<u>100%</u>	<u>\$ 176,187</u>	<u>100%</u>

Exhibit B

Section 6.09: Publications Board

A. Function

There shall be an administration board known as the Publications Board in which the general control of all student publications shall be vested.

B. Membership

1. The members of the Publications Board shall be:

- a. The editors and business managers of the *Stanford Chaparral*, *Daily*, *Quad*, and *Sequoia*.
- b. The manager of the *Stanford Blotter*.
- c. Three (3) members of the Senate appointed by the President.
- d. The Student Financial Manager and the Vice-President of this Association.
- e. A faculty representative of the Department of Communications.
- f. The Business Manager of Stanford University.
- g. The Director of the Stanford University Press.
- h. The Editor of the *Stanford Workshop*.

Each member shall have one vote. The President of this Association, the Station Manager of KZSU and the editors and business mana-

gers of non-official ASSU publications shall be ex-officio members without vote.

C. Officers

The officers of Publications Board shall be a Chairman and a Secretary, who shall be elected by the Board in Spring Quarter to serve the following academic year.

1. The duties of the Chairman shall be:

- a. To call and preside at all meetings of the Publications Board, and to carry out all actions passed by the Board,

- (1) to set the agendas for these meetings,

- (2) to represent the Board between meetings,

- (3) to vote only in case of tie;

- b. To oversee the proper use of all publications' funds.

- (1) to act as Publications Board Manager,

- (2) to oversee the expenditures from all improvement funds,

- (3) to be responsible for the closing of any open accounts from the past years' publications;

- c. to oversee the use and maintenance of Storke Student Publications Building, subject to guidelines set by Publications Board;

- d. to assure the enforcement of the By-Laws and Standing Rules of A.S.S.U. where publications are concerned;

- e. to serve as an impartial arbitrator in inter- or intra-publication disputes;

- f. to represent the Board and publications to the University in questions of finance or editorial policy.

2. The secretary shall keep minutes of each meeting and prepare these minutes for submission to the Senate.

D. Whenever an individual publication shall deem itself to be adversely affected by an action of the Board, it shall have the right to appeal the Board's action to the Senate, whose decision in the matter shall be final. All actions of the Board shall be determined by a majority vote unless otherwise provided.

E. Immediate Financial and Editorial Control

The immediate financial and editorial control of each publication shall be in a body local to that publication. Such bodies and the rules governing them shall be in the Standing Rules of this Board.

F. Amendments

1. Publications Board, upon a two-thirds vote of Publications Board and a majority vote of the Senate, provided that the changes

have been presented at the previous regular Senate meeting.

2. A three-fourths vote of the Senate, provided that the changes have been presented at the previous regular Senate meeting.

G. Publications Board Subcommittee

1. The Publications Board Subcommittee shall be composed of the chairman of Publications Board, an editor of one of the official A.S.S.U. publications and a business manager of one of the official A.S.S.U. publications. The latter two members shall be elected by Publications Board.
2. The Publications Board Subcommittee shall be empowered to act in behalf of Publications Board between regularly scheduled meetings of the Publications Board in the following functions: approval of distribution dates, granting of permission for distribution of spontaneous publications, granting of funds from the Assistance Fund as provided in Article III, Section 8, paragraph 6 of the Publications Board Standing Rules.

Exhibit C

ARTICLE VI: STANFORD DAILY

SECTION 1: Purposes

The Stanford Daily Publishing Board, as agent for this Association, will publish throughout the year a newspaper for the purpose of:

- a. Informing the Stanford community of university news.
- b. Printing other news of interest to the community.
- c. Printing opinions of interest to the community, provided that the Stanford Daily maintains high standards of objectivity and fairness by separating news from editorial opinion and giving persons with conflicting opinions reasonable opportunity to reply.

SECTION 2: Board Membership

a. The Publishing Board will consist of the editor, the business manager, the student financial manager, two persons employed by Stanford University when joining the Board but not registered as students, and two students who are members of the Legislature chosen in May by LASSU, one of whom will serve as chairman of the Board. Board members shall serve one-year terms beginning June 1, except for the editor, who will join the Board upon assuming office.

b. The two non-student members will be chosen by a vote in May of the editor, the editor-elect if

designated during May, the business manager, the business manager designate, the student financial manager, the student financial manager designate, with the present chairman voting in case of tie.

c. Vacancies among the non-student members or chairman will be filled by a vote of the editor, business manager and student financial manager.

d. Board membership will not be a paid position.

e. Quorum for board meetings will be four.

SECTION 3: Board Powers.

a. The Board will be responsible for carrying out the purposes of the Stanford Daily as listed in Section 1 of this article, and will exercise publisher's control over the Daily except that certain powers will be reserved the editor and the editorial staff as specified below.

b. The Board will elect a business manager in April to serve one year beginning June 1, who will exercise responsibility for the production, sales and distribution as provided by the Board. The business manager may be dismissed by a vote of five members and a successor chosen to serve the remainder of the term.

c. The Board may dismiss an editor by vote of five for repeated actions which contradict the purposes of the Stanford Daily as listed in Section 1 of this article, and conduct an election among the editorial staff to replace him.

d. The Board will supervise the election of the editor according to the procedures specified herein, and will set the editor's term in office, provided the term does not exceed 12 months, and provided no such decision affects an incumbent editor.

e. The Board will authorize payment of salaries for the editorial and business staffs and will maintain a staff list, Operating Rules and Procedures for the Stanford Daily, and written public minutes of all meetings.

SECTION 4: Staff Membership

a. The editorial and news content of the Stanford Daily and the duties of the editorial staff will be controlled by an editor, nominated and elected by the editorial staff.

b. The editorial staff, specified in a staff member list prepared monthly by the editor and submitted to the Board, will consist of those persons (1) who have worked under the editor for a period of not less than two months immediately prior to designation as a staff member, and who have worked at least thirty hours during that two-month period; and (2) those persons who were staff members at some time within the previous year and are currently working under the editor.

c. The editor may delete a person's name from the staff member list at any time, but that person may appeal this action to the Board, which, by vote of five, may restore that person to the staff member

list; but the Board may under no circumstances specify the duties of the staff member in question.

d. The Board, by vote of five, may delete a name from the staff member list if the person in question has not worked under the editor regularly during the previous two months, excluding summer months.

e. The editor, in each staff member list, will designate not more than 10 senior editors and any number of junior editors, the remainder of the list consisting of regular staff members. No person will be designated a senior editor without having appeared on a previous list as a junior editor.

SECTION 5: Election of Editor

a. The Board will set a deadline for nominations for editor not less than two weeks before the beginning of the next editor's term and will set a date for the election not less than one week before the beginning of the next editor's term.

b. The staff member list prior to the list in effect on the date of election will be valid for nomination and election procedures. The senior editors and the editor will convene as a committee to nominate candidates for the election. A candidate may also be nominated by a petition to the Board signed by one-third of the staff members. No person shall be a candidate who is not at least a junior editor.

c. In the election the editor will have four votes, the senior editors three, the junior editors two

and the other staff members one. Vote will be by secret ballot, supervised by the Board.

d. Each staff member will vote for one less person than there are candidates, indicating his first, second, and subsequent preferences. If no candidate receives a majority of first-place votes:

(1) the candidate receiving the fewest first-place votes will be dropped, and his first-place votes distributed among the remaining candidates according to the second-place preferences listed on those ballots.

(2) this procedure will be continued until one candidate receives a majority of first-place votes.

e. Should the editor resign or be dismissed, the Board will immediately request the senior editors to convene as a nominating committee and proceed with an election for an editor to serve the remainder of the former editor's term, except that the Board may appoint an interim successor should the vacancy occur in June, July, August or September.

Exhibit D

The Stanford Daily

Sunday, April 11, 1971 Stanford, California

Volume 159, Number 34A

Police Break Up Hospital Sit-in

By Ed Kohn

Clubswinging Palo Alto police and Santa Clara County Sheriff's Deputies cleared about 60 demonstrators from an administrative corridor at Stanford Hospital during a near-riot early Friday evening, ending a 30-hour sit-in.

Twenty-three persons, including the chairman of the Black Students' Union (BSU) and a candidate for the Palo Alto City Council, were arrested on a variety of charges that include assault with a deadly weapon, conspiracy, assault on a police officer, all felonies; malicious mischief, unlawful assembly, obstructing a police officer, failure to disperse and refusal to leave a public building after being ordered to do so (misdemeanors).

About two dozen demonstrators, not all of whom were arrested, and 13 police officers were reported injured. Most of the demonstrators suffered head and hand injuries after being clubbed by the police, while most of the police and sheriff's deputies were injured by flying glass, ashtrays, staplers, telephone books, table legs and other missiles.

The administrative offices where the demonstrators barricaded themselves were in shambles. Broken elec-

tric typewriters were strewn across floors; broken glass and water was under foot everywhere; furniture was damaged beyond recognition. Deputy hospital director Frank Vitale estimated damage at about \$100,000.

Alarms Set

Campus police reported 11 false fire alarms, five bomb threats—including two at the hospital—and two trash fires following the arrests. Three fire bombs were thrown at a PG&E substation near the Women's Gym early Saturday morning, but no damage was reported.

Palo Alto Police Chief James Zurcher said that 65 Palo Alto police were deployed. They were supplemented by 110 sheriff's deputies under a mutual aid agreement.

All of the adults arrested were released on bail or bond late Saturday night. The three minors arrested will remain in custody until Monday.

The adults will be arraigned at 10 a.m., April 21 at the North County Courthouse.

The near-riot—by far the most violent situation on campus since last spring—erupted over the firing of a black hospital custodian, Sam Bridges. [See accompanying story.] The demonstrators barricaded themselves in the offices of hospital director Dr. Thomas Gonda in an attempt to obtain Bridges' reinstatement.

The Black United Front (BUF), a coalition that includes the BSU, began the tense sit-in Thursday

afternoon after an apparent misunderstanding with Gonda about the form his response to its demands—including the immediate reinstatement of Bridges—was to take. Gonda later agreed to comply with all BUF demands except the reinstatement of Bridges.

Barricades Established

However, the BUF-administration negotiations broke down and shortly before 5 p.m. Friday, 60 of the demonstrators decided to remain in Gonda's office.

Hearing that at least one busload of police was on the way, they began to build barricades at both ends of the corridor. The demonstrators used desks, chairs, filing cabinets, table tops and other pieces of furniture to effectively barricade both sets of reinforced plate glass doors.

At about 5:45 p.m., police units moved in, blocking off exits at both ends of the corridor. Vitale demanded that the group immediately vacate the premises, saying that it was interfering with the orderly functioning of the hospital. Assistant Palo Alto Police Chief Anderson repeated the order to leave the premises, and gave the group five minutes to do so without facing arrest.

At 5:59 p.m., Anderson called in to BSU chairman Willie Newberry: "Then you're not going to leave?"

The reply shouted back at Anderson was a loud "Right on!"

Battering Ram

Police then produced a six-foot battering ram, which they apparently obtained from the hospital's

maintenance plant, and unsuccessfully began to attack one of the reinforced glass doors.

After several efforts, one pane of glass was smashed. Police attempted to spray a Mace-like substance at the demonstrators, but the protestors used a fire hose to repel both the charging police and their irritant. One policeman was hit by a flying stapler, and he collapsed in a pool of water.

The effects of the blown-back irritant then were felt by police, reporters, faculty observers and onlookers, and the situation remained static for about 10 minutes. The crowd, which was being held back by a double line of riot-equipped policemen, continued to shout encouragement to those sitting-in and obscenities at the police.

Onlookers Declared Illegal

"It takes a lot of nerve to hold those clubs against unarmed people," one woman yelled.

"Power to the people," the crowd chanted.

The onlookers and most of the press were then declared an unlawful assembly by Anderson, and the officers began to push them back in earnest. They stopped after the crowd had been moved back some 30 yards and contained behind a pair of locked glass doors. A hospital employee among the demonstrators produced a key, and unlocked the doors. An angry sergeant relocked them amidst a barrage of angry curses.

Police then repeatedly assaulted the barricaded doors, but were repelled three times by the use of

the fire hose and assorted missiles, including telephones.

In desperation, police loosened one door with what appeared to be a crowbar and a pair of bolt-cutters, and, at 6:30 p.m., using a rope, succeeded in pulling the twisted door out of the way.

"Let's Get 'Em"

As the door was pulled back with a rope, a police officer hollered "Let's get 'em," and the police eagerly vaulted over the barricade. At the same time, demonstrators opened a door at the other end of the corridor, where only ten policemen were stationed.

The officers were temporarily overwhelmed by the escaping protestors, and several policemen were beaten to the ground by demonstrators armed with clubs. One officer suffered an apparent broken shoulder of a result of a beating.

Other demonstrators left the offices through the windows—several of which were smashed—and shimmed to the ground on another fire hose. No one who escaped by this method was arrested.

At least one who was injured during the melee was later arrested as she was obtaining medical assistance at the Palo Alto Clinic.

One photographer on the scene estimated that it took police no more than 30 seconds to secure the entire occupied corridor. Several of the demonstrators were penned in and beaten by police. Injured police and demonstrators were treated on the scene

and in the emergency room by hospital personnel who were standing by.

As the corridor was being secured, the escaping demonstrators and others threw rocks at police vehicles. No one was reported injured in those incidents.

This is a special issue of the Daily. Because of Easter, no Monday issue will be printed. The Daily will resume its regular printing schedule Tuesday.

Page 2

The Stanford Daily

April 11

Reason Lost In Pace Of Events

By Felicity Barringer and Dan Bernstein

News Analysis

A sit-in, which, ironically, was not originally planned as a sit-in, developed Friday into one of the bloodier riots in Stanford history.

Throughout the 30-hour occupation of Administrative Offices at the Medical Center, and the intensive negotiating sessions that accompanied it, a few facts stand out.

—There was a crucial period early Friday afternoon which a combination of skillful negotiating and good timing might have resulted in a peaceful conclusion to the occupation.

—Once this chance had been forfeited by a combination of hasty decisions and intransigence on both

sides, the only alternative remaining was a bloody confrontation.

The occupation began almost by accident, as some 50 people left a noon rally for fired worker Sam Bridges and for Jose Aguilar, a professor who had not been granted tenure, and went to what they understood was a scheduled 1:00 p.m. meeting with Dr. Thomas Gonda, Associate Dean of the Medical Center.

Finding Gonda absent, the group decided to sit down in the foyer of his offices and wait for his return. Hours later, when Medical Center officials finally contacted Gonda, the demonstrators were still waiting before his offices. Gonda then met with members of the Black United Front (BUF), which was leading the group, and told them at that time that Bridges would not be rehired immediately.

The demonstrators then decided to stay until Bridges was rehired.

Groups represented in the continuing negotiations were the BUF, the Black Advisory Committee (BAC), and the hospital administration. At issue were the seven BUF demands, which dealt with the rights of employees to criticize the hospital administration, to form unions, to have grievance rights and to have peers present at those grievance procedures. Other demands were for the BAC and the Alanzia Latina, a Chicano workers' rights group, to have the right to investigate claims of violation of the above rights, and that fired janitor Bridges be rehired.

Five of these demands were readily agreed upon, as the administration declared that these rights already

existed. This left the demand for the rehiring of Bridges as the one point of contention.

A key factor in Friday morning's discussions was the reversal by the BAC of the previous stand they had taken supporting Bridges' firing.

During these negotiations many members of the BAC said that they would resign their jobs if Bridges was not rehired.

Upon the completion of the negotiations, misunderstandings started to develop on all sides.

Administration officials left the session with the understanding that the occupation would not stop until Bridges was rehired. Apparently basing his decision on that assumption, and after consultation with Gonda, Wilson, Associate Provost Robert Rosenzweig, and others, Acting President William Miller sent a statement to the sit-in, saying that "there will be no conclusion on the composition of dates for the grievance procedure while the occupation of the hospital continues."

What Miller and other Administration officials were unaware of was the developing willingness of the BUF to leave the occupation if the grievance procedures for Bridges were started immediately.

In fact, the BUF, in a meeting with the BAC and some black hospital workers, after the last session with administration officials, had agreed to leave if the grievance procedures for Bridges were started immediately, compromising on their demand for immediate rehiring.

Events, however, were going too fast to be reversed, or even slowed by now. Immediately after the BUF-BAC caucus had agreed on this point, according to Cheatam, the message came from Miller, which, in effect, slapped the demonstrators in the face right after they had made a concession. And, at the same time as Miller's statement arrived, word came from surveillance forces for the demonstrators that police were massing, and preparing to come to the hospital and stop the occupation.

Once the demonstrators had ascertained this, there was no backing down. Although they had agreed with the BAC to change their stand on Bridges' rehiring, they had had no time to make a statement to this effect and to leave with their goals apparently achieved. To leave without making a statement, after hearing of the massing of police, would amount to backing down under fire—something they would not do. Instead, they erected barricades to defend themselves, and asked all who did not want to remain inside to leave.

At the same time, having called the police, and having no knowledge of the turn of events in the negotiations, Administration officials could not recall the police. The stage for the confrontation was set, and the outcome inevitable.

Administration officials defend the timing of the police action stating that they wanted to proceed while it was still light, after the adjacent clinics had been closed, and before visiting hours began, so that corridor traffic would be at a minimum.

Between the confusion of demands, negotiations, pressures and counter-pressures, at least one crucial element of compromise was lost in the shuffle. The BUF was willing to compromise, but the Administration did not know it when it took its irrevocable step and called police.

Provost Statement

Closing and occupying an area of a hospital is not an acceptable way to pursue a grievance or make a point. When that tactic is used, as it was for more than 30 hours at the Stanford Hospital, the question for the Administration to answer is how to end the occupation with the least possible danger to patient-care services and the least possible risk to patients.

So long as there was a reasonable chance that Dr. Wilson and Dr. Gonda might persuade the people involved to leave voluntarily, I was prepared to refrain from asking for police assistance. However, disruption of hospital functions could not be allowed to continue for long, and when it became clear this afternoon that further discussion would not be productive, I asked the Palo Alto Police for assistance.

I regret, as much as anyone, that this disturbance had to be tolerated even for as long as it was. I hope it will be recognized, however, that what was at issue here was not simply expensive research equipment or valuable records, but sick people. Our first obligation was to protect their interests and each decision to act or not to act was taken with that in mind.

Before the sit-in began, the community was informed that the Hospital agreed with five of the six demands made on it. On one, the rehiring of Sam Bridges, the answer on Thursday morning was that grievance procedures are available to him if he wishes to use them. That answer still stands. If Mr. Bridges wants to file a grievance, he can be assured of a full and fair airing of the facts of his case.

William F. Miller

Page 4 The Stanford Daily April 11, 1971

BRIDGES' CASE

By Bob Litterman

Sam Bridges' firing and the subsequent negotiations concerning his case have been shrouded by misunderstanding. Bridges was first hired as a janitor for the hospital February 22. During his first month on the job, several complaints were made to his supervisor to the effect that Bridges was not doing his job.

Because the hospital was concerned about Bridges' feeling discriminated against, he was asked to attend a meeting with his supervisor, the hospital minority relations counselor Shirlee Parish, and the Assistant Chief of Engineering Warren Thorpe. At that meeting, Bridges told Parish that he had not asked for her help and did not need it.

More Complaints

After that meeting, Bridges had additional complaints made against him which included "having words" with another employee and a security guard. The security guard told his sergeant who called Thorpe to report the incident. Thorpe is alleged to have told the sergeant that he didn't need to worry because Bridges would soon be fired.

One week later, on March 16, Thorpe gave Bridges two weeks notice that he would be fired. Thorpe also told Bridges that grievance procedures were available, but Bridges later told the BAC that he was unclear what the procedures were and whether they applied to him since he was in his first six months of employment.

The next step Bridges took was to ask the help of the Black Students Union, the Black Worker's Caucus and the Black Liberation Front, a revolutionary group based in Redwood City. These groups formed the Black United Front (BUF) and began circulating a leaflet charging that Bridges had been discriminated against.

When he heard of this leaflet, Cheatham, a member of the Black Advisory Committee (BAC) initiated an investigation into the case. As a result of an initial hearing with Parish, Thorpe and Bridges supervisor the BAC issued a statement that stated in part:

"Mr. Bridges was terminated because he was not doing the job he was hired to do, and therefore putting an added burden on his co-workers."

BUF Rally

Last Tuesday the BUF held a rally in Bridges behalf at which time they presented a list of six demands including the reinstatement of Bridges to Dr. Thomas Gonda, Director of the hospital. At that time, the BUF was led to believe that Gonda would personally give them a response 48 hours later, Thursday at 1 p.m.

Wednesday, Gonda responded with a list of written responses to the six demands. He basically agreed to five of the six demands.

The BUF scheduled a press conference Thursday morning with MECHA and Alianza Latina, a Chicano hospital workers group, to discuss Bridges' case and that of Dr. Jose Aguilar, a Chicano doctor denied tenure to the medical school faculty.

After that press conference, the two groups held a rally and shortly after 1 p.m. marched into the hospital to hear Gonda's reply to the demands.

When the group which numbered close to 100 got to Gonda's office, they were met by deputy director Frank Vitale who passed out Gonda's written response and told the group that he did not know where Gonda was. Vitale said he did not think Gonda knew he was expected to appear in person.

The BUF decided to sit down in the corridor outside Gonda's office and wait for him.

Facts Left Unmentioned

The BUF met with the BAC that afternoon at which time Bridges argued that it could not have

reviewed the case since he had never appeared before it. The BAC announced that "All the facts . . . have not been presented." A hearing was scheduled for 8 a.m. Friday morning.

At the Friday morning meeting, several new facts were presented to the BAC. Among these were:

1. Bridges claimed he was not adequately informed of his job duties. His supervisor said he had not informed Bridges of his duties, but had introduced him to the foreman. The foreman said he had introduced Bridges to a fellow worker whom he assumed had described Bridges duties to him. Bridges was never given a job description form.

2. The employee who had had the run-in with Bridges described it as "not that serious."

3. One worker who was supposed to have seen Bridges asleep during his working hours said he had not actually seen Bridges asleep, but had heard of it.

On the basis of the testimony at this meeting, the BAC reversed its earlier decision and recommended that Bridges be immediately rehired.

The BAC immediately thereafter met with Gonda to inform him of its recommendations. Gonda decided that Bridges would have to go through the formal grievance procedures and he could not rehire Bridges immediately on his own authority.

As negotiations continued the BUF asked that the first three of four steps in the grievance procedures be bypassed, and that they go directly to step four, the review by Gonda himself.

At this point Gonda ruled that he could not handle this procedure himself and that some other impartial person be appointed. The BUF agreed upon Hank Oregan, and Gonda went to get approval of this procedure from John L. Wilson, dean of the medical center, and William Miller, acting President of the University.

End In Sight

After Gonda left, the BUF met with black hospital workers and decided to end the sit-in as soon as the grievance procedures were started according to the plan.

Soon after, however, the BUF received a statement from Miller saying that:

"I have Gonda's recommendations under consideration. However, we agree there will be no conclusion on the composition or dates for the Grievance Procedure while the occupation of the Hospital continues."

Soon after this statement arrived the BUF heard reports that police were massing. They then barricaded the doors to the corridor and there were no further negotiations.

BSU HITS 'RACISM'

By Dave Spector

The Black Students Union blasted the "racism" of the police action at the Medical Center in the arrest of ex-BSU Chairman Leo Bazde and the "brutal tactics employed by Stanford University against peace-

ful demonstrators" in a press conference Saturday afternoon.

BSU Co-chairman Mike Dawson stated, "Last year and earlier this year in massive student demonstrations by mostly white youths, there was not this type of police action in response . . . that black people were involved in this protest in large numbers was reason police action so heavy."

Because "the University has bargained in bad faith in enlisting the support of the Santa Clara police to disrupt our peaceful demonstration," the Black United Front demands were reiterated.

All, except the rehiring of Sam Bridges and amnesty, were agreed to by Dr. Thomas Gonda, director of the Medical Center, Friday morning.

The BSU statement affirmed "we cannot allow business to be carried out as usual at Stanford University until all demands are met" because "of the brutal tactics employed by Stanford University against peaceful demonstrators."

BAC, AL STATEMENTS

We, the members of the Black Advisory Committee, are appalled at the violence perpetuated by the police on a non-violent assembly. We are also appalled at the idea that the Acting President of the University would find it necessary to order police into a patient area, especially after the hospital Director stated that there would be no police action upon the occupants of the administrative suite.

We are holding a closed meeting for black employees at 9:30 a.m. Monday morning in room M104 in the Medical School, then adjourn and go to a mass rally at 10:30 a.m. Monday morning at the Medical School lawn off Campus Drive.

Black Advisory Committee

The Alianza Latina supports 100 percent the final finding of the Black Advisory Committee. That is, that Sam Bridges was unjustly terminated and that he be reinstated with pay retroactive to day of discharge.

However this issue has now been transcended by the vicious and totally unwarranted police action on a peaceful assembly of employees and friends.

This assault on black, brown, and white individuals has tragically pinpointed Stanford University's attitude toward minority employees. Provost Miller's decision to use University tactics (refusing to negotiate and resorting to police violence) on employees is a striking (no pun intended) example of his arrogance.

This violation of the workers' basic right to peacefully protest an unjust administrative act should be the concern of all workers.

There will be a meeting of all Latin employees Monday morning at 9:30 a.m. in room M106.

Alianza Latina

Exhibit E

February 10, 1970

THE STANFORD DAILY

Editorial:

POLITICS AND PHOTOS

The news media today is caught in a pair of scissors. While protest groups defensively resist full news coverage, police subpoena photographs and film to help prosecute demonstrators. Caught between two blades in a political argument, news gathering ability is being cut to shreds.

At Stanford, Daily photographers have been excluded from new Moratorium and SDS meetings. We recognize and regret the objections raised by the two groups—that newspaper pictures have been used to convict demonstrators. But we resent these attempts to interfere with coverage of lawful, open community meetings on campus.

The Daily cannot pursue news gathering in a vacuum, ignoring the consequences of what it prints. Neither can we brush aside our responsibility to print and picture the news fairly and fully. Responding to both journalistic responsibilities and the realities of government subpoenas, the Daily staff has voted to accept the following policy for reporting meetings and demonstrations.

1) Photographers will be assigned to newsworthy events, and they will remain until explicitly excluded. If they or their equipment are harmed, the Daily will

press charges through campus and community judicial bodies. However, the Daily will not withhold news coverage to force access for its photographers.

2) The Daily will print newsworthy photographs regardless of their potential for incrimination. This is essential to full coverage of events.

3) Negatives which may be used to convict protestors will be destroyed. We feel that a line can and should be drawn at this point between journalistic responsibility and cooperation with government authorities in protests that are often directed against the government. Once a story has been printed, pictures taken with it are rarely used again. However, negatives which never appear in the paper may be used to convict demonstrators.

The Daily feels no obligation to help in the prosecution of students for crimes related to political activity. Our purpose is to gather information for our readers, not for police files.

We advise both the police and the protest movement to consider again what they sacrifice when they tamper with the press' ability to present the news. The press must act as much more than a political weapon or shield.

In this spirit of responsibility, realism and independent, we present our policy.

Exhibit F

THE STANFORD DAILY

Editorials:

Yesterday's search of the Daily office for photographic evidence relating to last Friday's violent sit-in was one more in a growing list of examples of the intimidation and harrasment [sic] being inflicted on the news media by governmental agencies. It is the function of the press to inform as many people as possible of decisions and events affecting their lives. The facts imparted by the press give these people a chance to affect these decisions and events, by arming them with knowledge. If this function is impaired in any way, the ability of these people to control their own lives is jeopardized. [sic] In light of this, it is extremely difficult, if not impossible for any news organization to perform its function in a democratic society if it is constantly under the threat of a governmental subpoena or a government-sanctioned search of its premises.

A search such as yesterday's is particularly devastating to a newspaper's ability to keep its own confidential files. Although no evidence relating to Friday's demonstration was found yesterday, all photographic and editorial files were examined. Since this search was made, the possibility that subpoenas might be issued at a later date for material officers saw during this fishing expedition does not seem remote.

It has been the Daily's standing policy to destroy all potentially incriminating unpublished photographic

material. That policy, while regrettable, is a necessity. It hampers our ability to keep files which may be of future informational use. However, more important even than keeping these files is the necessity for a news organization to keep itself from becoming a filing service for evidence to be used in civil or criminal courts. Until such time as it becomes evident that the threat of actions such as yesterday's no longer exists, we will stand by this policy.

We also intend to examine all possible legal roads that may lead to the prevention of acts such as yesterday's search. In a truly free society, the news media and the government must remain as far separated from each other as possible. The use of searches, subpoenas, and all other forms of governmental harassment [sic] obviously have a chilling effect on the freedom of the media to exercise the rights guaranteed them by the First Amendment. If the government of this country, both on the national and local level, continues to employ intimidating tactics, it must be challenged at every step of the way. This is the only possible answer to actions such as yesterday's, if we are to have a truly free press.

Monday morning quarterbacking, of a football game or a campus disruption, has little meaning in terms of the actual events being examined. Its usefulness is largely limited to suggesting guidelines for action in possible future occurrences. In this light, we offer our reactions to the events of last Friday.

We cannot help but think that the decision to call the police to the scene of the sit-in was disastrous.

When the police were called, negotiations were proceeding satisfactorily, although the administration was unaware of the fact. While the administration has defended its actions on the grounds that patients were being disturbed, it is evident that not all doctors with patients concerned were consulted. Furthermore, the demonstrators were neither clearly nor specifically informed how their presence endangered patient welfare. Finally, the nature of the demonstrators made a violent response to police presence very likely, though not inevitable.

The case of the fired custodian, Sam Bridges, is almost as complex as the sit-in his firing precipitated. We are studying the charges made against him and will discuss the validity of those charges in a later editorial.

Thus, the administration decision to wash its hands of the sit-in and give final authority in the matter to the police was both unwise and unwarranted. The events of Friday clearly demonstrate that the circle from which that decision emerged is too small and too closed. More input about the status of the negotiations, the welfare of the patients, or the nature of the demonstrators could have forestalled the tragedy.

We are less certain in our analysis of the actions and tactics of the demonstrators. Our editorial board is evenly divided as to the question of their resistance. Half of the board feels that the building of a barricade and the subsequent fighting with the police was unwarranted, that a nonviolent reaction to the police

presence was in order. The other half understands the demonstrators' actions, holding that their response to the arrival of the police was inevitable.

Most of us agree that the destruction of the offices was unwarranted. The damaging of furniture and the scattering of files has no rational defense in our minds.

If we are to learn anything from the events of last Friday, it is that decisions to use police force may have unexpected consequences. Both Provost Miller and President Lyman had best anticipate them in the future.

In the United States District Court
for the Northern District of California

[Title Omitted in Printing]

AFFIDAVIT

State of New York

County of New York ss

GORDON MANNING, being duly sworn, deposes and says:

1. I am Senior Vice President and Director of News for CBS News, a division of Columbia Broadcasting System, Inc. Before joining CBS news, I was *Newsweek's* Senior Editor for five years and was named Executive Editor in 1961. I began my professional career with United Press in Boston and worked in various reportorial and editorial positions

with United Press. I served in the United States Navy during World War II. After the war, I became a staff writer for Collier's Magazine and was its Managing Editor from 1950 to 1956.

2. My work for CBS News consists of general responsibility for all regularly-scheduled CBS Television Network news broadcasts, on both radio and television, as well as for urgent Special Reports, the coverage of special events, newsfilm syndication and the administration and direction of all CBS News staffs and bureaus, the correspondents and other news and administrative personnel, foreign and domestic.

3. Quite obviously, the success of these efforts depends on the ability of hundreds of employees performing dozens of functions to perform these functions free from inhibiting or disruptive influences. Such influences can take many forms. The use or misuse of the subpoena power by agencies of the government to obtain material other than that which is actually published or broadcast has, of course, been the "inhibiting influence" with which we have recently and publicly been concerned in connection with CBS' broadcast of "The Selling of the Pentagon". The specific objection to this use of broadcasters' "outtake" material was the threat of governmental second-guessing of journalistic decisions. That case, with which we have quite naturally been identified so closely, is in one sense merely the tip of the iceberg.

4. The increasing use of the subpoena power by governmental agencies puts broadcasters and other journalists in the position of being *de facto* investiga-

tive arms of the government. The inevitable effects of this are that news sources dry up, reporters may be tempted to be timid in choosing and preparing their reports through fear of themselves being subpoenaed, and the temptation arises to destroy outtake material which might otherwise be useful for follow-up reports or historical preservation. All of these effects are significantly inimical to the functioning of a free press.

5. All of this is relevant to the case at hand because the use of a search warrant in the manner used by the Palo Alto police in connection with its search of the offices of *The Stanford Daily* embodies all of the evils of misuse of the subpoena power as well as enough extra dangers to make it an especially alarming intrusion into the already threatened freedom of the press. To allow this kind of free-wheeling search is to invite more searches, since a working newsroom contains an abundance of information, much of which would be argued by investigators to be useful whether or not material obtained in this way could be used as evidence. The temptations would clearly be strong, and the acting on these temptations would be disastrous. Not only would the news gathering and reporting functions be inhibited in an exaggerated but a similar way to which the subpoena power inhibits, but also the very ability of a news organization to operate would be threatened. A search warrant presumes that material must be sifted before the needed material is located. I can imagine the workings of a newsroom being brought to a complete halt while voluminous and as yet unorganized information is "searched". The result would be intolerable, especially to a profession which de-

pends on the intelligent processing of information in the shortest possible time. That such a search may later be held illegal at best only partially can undo the damage.

6. In sum I strongly believe that only strong disavowal of such techniques by governmental agencies can free the press from being affected by influences which have no place in the practice of journalism. The use of a search warrant to obtain unpublished information from a journalist appears to me to be an especially serious threat to the maintenance of a free press, one which is intolerable in an era when journalistic freedom is at the same time so important and so fragile.

/s/ Gordon Manning
Gordon Manning

(Jurat omitted in printing)

In the United States District Court
for the Northern District of California

[Title Omitted in Printing]

AFFIDAVIT

State of New York
County of New York—ss.

GENE ROBERTS, being duly sworn, deposes and says:

1. I am National News Editor of *The New York Times*, a position I have held for three years. Prior

to that time, I was Chief Correspondent for *The Times* in Vietnam for one year and in the South for three years. Before joining *The Times*, I was an editor and reporter for the *Detroit Free Press*, *The Norfolk Virginian* and *The Raleigh (North Carolina) News and Observer*. I have been a full time journalist for the last fifteen years and have had wide experience as a working reporter and an editor.

2. I submit this affidavit in support of the motion of the plaintiffs for summary judgment that the search of the *Stanford Daily* on April 12, 1971 be declared illegal and unconstitutional. As a journalist, I am deeply concerned with maintaining the freedom and integrity of our nation's press. A police search of a newspaper office, even with a warrant, constitutes a clear and present threat to that integrity and freedom. If the search which was conducted in this case is permitted to stand, it is clear to me that no newspaper office in the country will be safe from official intrusion.

3. In the case of the *United States v. Earl Caldwell*, now on appeal by the United States government in the United States Supreme Court, the Ninth Circuit Court of Appeals held that a governmental investigative body must show a compelling and overriding national or state interest before requiring disclosure of a reporter's confidences. However, far more dangerous to a free press, and far more likely to result in the closing off of important news sources, I believe, is an unrestricted search of a newspaper's offices and the rifling of its files of the raw material that makes up the newspaper's published contents.

4. A government search of a newspaper office for its unpublished photographs, and other material, is certain to have a profoundly adverse impact on the newspaper's ability to gather the news. First, its reporters and photographers would earn the reputation of unwilling police agents, and their access to much sensitive information would be severely restricted. The *Caldwell* case, and its companion case *In the Matter of Paul Pappas*, each involve the threatened loss of a reporter's access to the Black Panther party. The other companion case, *Branzburg v. Hayes*, involves the reporter's sources of information with respect to illicit drug traffic. In each of these cases, the reporter swore that upon public divulgence of his confidential informants he would lose his sources for reporting obviously newsworthy activities.

5. The potential loss of sources because of their forced disclosure is an unfortunate reality with which all journalists live. This was well illustrated when Anthony Ripley, a *Times* reporter who had been reporting on the activities of radical groups, was summoned in 1969 to appear before a Congressional investigating committee. Ripley appeared before the committee and, although he testified only as to matters which had appeared in print, his effectiveness as a reporter on radical activities was effectively destroyed. Meetings to which he had previously had access were no longer open to him or, indeed, to other *Times* reporters, and other sources of information quickly dried up. In fact, the entire press suffered as a result of Ripley's forced appearance and much important information was forever lost to the public.

6. If a mere appearance before a government body can have such a destructive effect on a reporter's ability to gather the news, it is clear to me that a search of a newspaper office—during which everything in that office is open to official scrutiny—could be devastating. The parameters of the impact of such a search are hard to define only because in my fifteen years as a reporter and editor I have never before heard of a search of a newspaper office being permitted in this country.

7. The files of *The New York Times* contain many photographs and much information obtained in confidence, or with some restrictions, from a variety of persons in whom, and groups in which, government officials are interested. In the event our offices were subjected to a police search I am certain that many of these important news sources would be forever closed to our reporters and photographers, and thus to the public.

8. Of equal concern to me as an editor is the potential impact of newspaper office searches on the day to day work of reporters and photographers. If reporters and photographers believe that the information they gather will be available to government officials, they will not be eager to get the sensitive story, or to track down the individual who will supply the critical information. And I, as an editor, will consider carefully before publishing facts, or a photograph, which might imply that there is more than appears.

9. All reporters have taken written notes of factual disclosures received in confidence. If such notes are

subject to police seizure, it is likely the reporters will stop bringing them back to their offices and using them as aids in preparing their stories. I am obviously concerned for the quality and character of journalism if reporters refrain from taking notes or taping interviews for fear that this raw stuff might be easily available to government officials through the device of a search warrant.

10. A newspaper is built on millions of words and thousands of photographs. It cannot function as it should if these words and photographs can easily be examined and confiscated by government agencies.

A dangerous precedent has been set by those who authorized and conducted the search of the offices of the *Stanford Daily*. Unless this Court holds firmly and unequivocally that this search was constitutionally impermissible, no newspaper office in the country will be safe from similar police action.

The danger is real and the threat to press freedom and independence is something with which this nation's press and public cannot easily live.

/s/ Gene Roberts
Gene Roberts

(Jurat omitted in printing)

In the United States District Court
for the Northern District of California

[Title Omitted in Printing]

AFFIDAVIT OF DON TOLLEFSON

DON TOLLEFSON, being duly sworn, deposes and says:

1. I am entering my Senior year at Stanford University, and I am a Communications Major. I have been working on the *Stanford Daily* since September, 1969, and I am presently the Editor-in-Chief. My job requires over 40 hours per week.

2. Around 5:40 p.m. on April 12, 1971, after picking up news releases from the University News Service, I returned to the *Daily* offices and noticed a Stanford Police car parked in front of the Storke Student Publications Building. When I entered the main door of the building I noticed two uniformed police officers standing in the doorway of the *Daily* editorial offices, discussing something with a couple of *Daily* reporters and two men in suits. As I entered the editorial offices, one of the men in suits (a Palo Alto Police Officer) asked another *Daily* reporter who I was. When he was told that I was the News Editor, (the position I held at the time) a search warrant was given to me. I glanced at it and when asked where the Editor was, I said that I did not know, but that I hoped she would arrive soon.

3. I then went into the News Office in order to phone some other editors. I was unable to contact anyone and the police officers shortly said that they had

to begin their search. They asked me if I would cooperate. I did not answer, and they headed towards the darkroom while I was still on the phone. During the next 15 or so minutes I went back and forth between the photo offices and the editorial offices, still trying to contact other members of our editorial board. During this period I observed the officers in the photo office for a number of minutes. All of our file cabinets and wastebaskets were gone through. I also observed one plainclothes officer making a search of the *Quad* (yearbook) photo files and carefully examining their negatives. I remember at least one person mentioning the fact that they were searching the *Quad* files in a voice loud enough for the officers to hear.

4. Shortly after observing the foregoing, I received a call from KPIX News regarding some of the demands which had been issued at the Medical Center earlier in the day and I went into the Business Manager's office to use the phone there because the rest of the offices were quite hectic. Because people were running in and out of all the offices, I shut and locked both doors going into the business office. While I was talking on the phone, some people began to knock on the door, and because I was in an inner office and thus could not see them, I yelled for them to wait, but the knocking continued. I then got up and saw that it was the police, accompanied by a number of reporters and other people who had walked across the hallway from the photo offices. When I first saw them, the uniformed Palo Alto officer was attempting to open the window adjoining the door. I opened the door and let them in.

While they were in the business office, the uniformed officer went through a stack of that day's edition of the paper, unfolded them, and shook them out.

5. When I hung the phone up, I left the business office and went back to the editorial office where I saw a uniformed officer sitting at the Editor's desk. I observed him while he searched through the drawers of that and the other desks in the office which at the time belonged to Fred Mann, Ed Kohn, and myself. In the next few minutes I saw him sift through a number of items of correspondence in and on the desks and I saw him look at least one letter for a long enough period of time to have read it. Shortly after this, the police left.

6. As the time of the search, my desk contained notes gathered during the course of my work which typically includes information given to me in confidence. Confidential information and sources are very important in terms of allowing me to function effectively as a reporter. If people felt that information given me in confidence might possibly be available to the police, many news sources might refuse to give me any further information and this would greatly hamper my ability to report the news completely.

7. To my knowledge no staff member of the *Daily* was in no way involved in the planning or participation in the Medical Center sit-in or the events arising out of it, no *Daily* reporter or photographer had any more interest in the proceedings than as a newsworthy event.

8. Prior to the search, I have observed several instances of harassment of photographers in which the *Daily's* policy helped to extricate photographers from difficult situations involving confrontations with angry or suspicious demonstrators. On the night of February 8, 1971, I was covering disturbances which followed a meeting at Dinkelspiel Auditorium. In the hour following the demonstration, approximately 60 windows were broken on campus. While following the crowd around I was aware of a number of confrontations which occurred between *Daily* photographers and people in the crowd. I was with our photo editor, Lee Greathouse, when a young man told him that "the people" didn't want any pictures. Greathouse discussed the matter briefly with him and explained that he was from the *Daily*, and that our policy was to cover the news, not to turn photos over to the police. This pacified the man to an extent, and he didn't take as harsh an attitude as I'm sure he would have had we not explained our policy. He still was not very happy about our taking pictures, but he was unwilling to use force to prevent us, as he had been at first. On that evening and subsequently during disturbances, identification as a *Daily* photographer was usually enough to admit our photographers to meetings and keep them from being bothered. In my opinion, without this protection, we would have had no more chance than other outside newspapers to cover the events on campus.

9. Because of the search, I now realize that the police could have access to our photo files. Unfortu-

nately, I think demonstrators realize this too, and I know that the fear that the authorities may use our photos has hampered our ability to cover the news. An incident that I observed April 21, 1972 illustrates this. On that date I was covering as a *Daily* reporter, a student strike at Stanford which was part of a national student strike called to protest the bombing of North Vietnam. As part of my coverage, I attended a 10:00 a.m. Biology class in Stanford's Dinkelspiel Auditorium, which had been picked as a strike target. A *Daily* photographer, Harvey Rogoff, was with me in the auditorium, also covering the strike. A number of demonstrators blocked the doors to Dinkelspiel and numerous scuffles broke out between some of the demonstrators and a number of students who were attempting to enter the class. Twenty-five or thirty students did make it into the class, but a member of Venceremos, a local revolutionary organization, repeatedly interrupted the professor, despite a vote of the students which was overwhelmingly in favor of the professor continuing with his scheduled instruction. A number of students began to heckle the Venceremos member and finally he went into the audience and slapped a student quite vigorously. Rogoff took a picture of the incident and then began walking out into the lobby. There, in the doorways, scuffling and arguing was still going on between demonstrators and students who wanted to enter the auditorium. As Rogoff was leaving, another member of Venceremos, who had entered the auditorium through a rear entrance a few minutes previously, charged up the stairs after him.

He confronted Rogoff in the lobby, grabbed him and demanded that Rogoff give him the film. The demonstrator became very vocally abusive and when it looked as if he might physically assault Rogoff, Rogoff told him that the pictures would not be printed in the *Daily*. But despite this assurance, the demonstrator continued to harass Rogoff and indicated that he through [sic] that Rogoff's potentially incriminating pictures might be available to the authorities. Rogoff still refused to hand the film over to the demonstrator and just when it seemed as if he was again on the verge of physically assaulting Rogoff, a disturbance flared up in the doorway again and the demonstrator joined some other demonstrators who were still trying to prevent students from entering the auditorium.

10. Photos serve not only an important esthetic function in a newspaper, but also serve a valuable news function as well. Pictures of civil disobedience and disturbances in particular add substantially to our political coverage, we could not serve our function as an important source of local news if we could not continue to take the type of photos that we do now.

11. Although in the absence of the service of a subpoena the *Daily* considers itself free to dispose of or destroy any of its property, including unpublished materials or photographic stills, the policy of the *Daily* is not to destroy any material covered by a judicially authorized subpoena and, to my knowledge, no such destruction has ever occurred. During my three years on the *Daily*, it has been the policy of the *Daily* to

choose photographs for publication solely on the basis of newsworthiness and without regard to whether the photographs might be incriminating to the persons depicted therein.

Executed this 18th day of June, 1972.

/s/ Don Tollefson
Don Tollefson

(Jurat omitted in printing)

In the United States District Court
for the Northern District of California

[Title omitted in printing]

AFFIDAVIT OF STEVEN G. UNGAR

The State of California
County of San Francisco—ss.

Steven G. Ungar, being duly sworn, deposes and says:

I am a member of the staff of the Stanford Daily. I was present when Palo Alto police officers searched the *Daily* offices on April 12, 1971. The following is an account of the incidents I observed, as best I can remember.

I was in the *Daily* office from about 5:20 until 7:20 the evening of April 12, 1971. I came to the office to deliver a camera to Bill Cooke, the *Daily* head photographer. I had borrowed the camera the night before in order to cover a rally at the Medical School that

was held the morning of the 12th. The camera was a Nikkormat with a 135 mm. lens.

I called the *Daily* office at 5:15 and was told I could bring the camera to the office and it would be locked in the darkroom by Don Tollefson, the news editor. When I arrived at the office moments later I was told that Tollefson had stepped out and would return shortly. After waiting for about fifteen minutes I decided to leave and return later in the evening. As I approached the front door of the *Daily* office I noticed several men emerging from a white car that had parked across the street. Some of the men were dressed in police uniforms, which led me to believe that the car was an unmarked police car. The men crossed the street and approached the *Daily* office.

When they entered the lobby they stopped to examine a directory sign that is posted near the door. One of the men said, "Do you know where you're going?" and another answered, "No, I don't." At this point I stepped up to the group and asked if I could be of assistance.

One of the non-uniformed men asked me if I was "the man in charge." I told him that I wasn't, but that I might be able to help him anyway. He asked to see "the man in charge." I told him to follow me, and entered the *Daily* news office. The group did not enter the office, but waited outside the door.

I crossed the room to the editor's desk where Ed Kohn, the *Daily's* political reporter, was seated. I asked him if Felicity Barringer, the editor, were pres-

ent. He said she was not. I told him that we "had some visitors," and that he might want to meet them. He walked across the room to the door where the group was waiting. I followed at a short distance. When I got to the door I heard the non-uniformed man mention the word "warrant". He tried to present a paper to Kohn, but Kohn refused to take it, and said something to the effect that it was no use giving it to him as he was not in charge here. The man replied that it didn't matter, as long as he worked there.

By this time a small crowd had developed around the door, including several reporters, workers from the ASSU type shop, and one or two visitors who had come to the office to transact business. After a short delay, in which it was determined that Barringer could not be immediately produced, the officers announced that they would wait only a limited time before commencing a search of the *Daily* office.

At this point Ralph Kostant, a *Daily* reporter, made a picture-taking motion in my direction. I moved back into the office, away from the door, and loaded the camera that I had been wearing around my neck.

I proceeded to take pictures of the group around the door of the news office. About five minutes later the officers announced that they would begin searching the office. Kohn told them to go right ahead, pointed out the photo lab, the business office, the news office, the editorial office, and the type shop, and told them to start wherever they wanted. Four of the men pro-

ceeded to the photo lab. Another, a Stanford Police officer, remained in the lobby.

I followed the four men into the photo lab. Two of them began to examine contact sheets and prints in the darkroom. The other two began to search through desks on either side of the photo lab. I entered the darkroom and took several pictures of the two men rummaging through a waste box. I was called into the photo lab where one of the men was searching a filing cabinet. This man (the non-uniformed man who had first addressed me, and who had produced the search warrant) continued to search this cabinet for about 45 minutes. He would remove a glassine envelope of negatives, slide a strip of negative out of the envelope, hold the strip up to the light, and then re-insert it and proceed to the next envelope. I took about 20 pictures of this activity.

After about 10 minutes I left the photo lab and went back into the news office. There were no officers in the news office, and it was very quiet. I returned to the lobby, where I spoke briefly with the Stanford police officer. He informed me that he was present because it was customary for officers to accompany officers from another jurisdiction when the other officers have entered the jurisdiction to execute a court order or to make an arrest. I pointed out that he is not a peace officer, and that Stanford is in the jurisdiction of the Santa Clara County Sheriff, so Sheriff's deputies should have been present. He told me that if an arrest were to be made, they probably would have been summoned.

I re-entered the photo lab. The search was continuing, as before. Paul Grushkin, a *Daily* reporter and a former news editor, was present, and he urged me to take more pictures of the search. I continued to take pictures of the men searching the files in the news office.

A short time later, Felicity Barringer appeared. She spoke to several of the men, and watched as the search proceeded. Many people had gathered in the *Daily* office, including a man who later identified himself to me as Jim Wolpman, an attorney, several people who identified themselves as reporters from radio station KZSU, and another photographer, who did not identify himself to me. Bob Byers, of the Stanford University News Service, also appeared.

At approximately 6:10, all but one of the officers left the photo lab and proceeded to search the rest of the office. I went with one of the uniformed Palo Alto officers into the *Daily* business office. He gave only cursory examination to the files and desks in the business office. Most of these files and desks are kept locked, as they contain important papers and documents relating to the business aspects of the newspaper.

The officer entered the news office, opened and examined the contents of the desk of Fred Mann, the managing editor, and of Felicity Barringer, the editor. I took several pictures of the officer examining the contents of Barringer's desk. While examining the desk he stopped several times to look at documents

that were in the desk, and he appeared to be reading these documents.

The officer proceeded to the sports desk, but made only cursory examination of the contents. He tried the door to the printing room, found it locked, and proceeded to the mailboxes near the door to the news office. He examined the contents of the boxes. He entered the editorial office, and proceeded almost immediately into the ASSU type shop. He was informed that the type shop was not part of the *Stanford Daily*, and he immediately left.

I returned to the photo lab, where the search through the file cabinets was still in progress. A small crowd of perhaps ten people were present. I climbed to the top of a cabinet, and photographed the rest of the search from there. Lee Greathouse, the *Daily* photo editor, entered at about this time, and proceeded to take pictures.

After a few minutes, the officers concluded their search, and left the office. I followed them to their car and took a last picture as they were entering the car.

Dated: May 15, 1971

/s/ Steven G. Ungar
Steven G. Ungar

(Jurat omitted in printing)

In the United States District Court
for the Northern District of California

[Title omitted in printing]

AFFIDAVIT OF STEVEN G. UNGAR

The State of California
County of San Francisco—ss.

Steven G. Ungar, being duly sworn, deposes and says:

I am a Ph.D. candidate in Electrical Engineering and I am twenty-six years old. I have been on the staff of the *Stanford Daily* since April, 1969. In January, 1971, I was asked to join the photography staff of the newspaper, an invitation which came after I took some pictures of scientific apparatus at the Stanford Artificial Intelligence Project. My primary purpose in that reporting was to convey, in words, the importance and meaning of the work being performed. However, it was obvious to me that the story would be worth much more with pictures.

This is generally true; some stories cannot be told without pictures. The murders of President Kennedy, of Lee Harvey Oswald, and of Robert Kennedy were all made more real, and more frightening, because an alert photographer happened to be on the scene. Edward White's walk in space, Neil Armstrong's first step on the moon, the famous view of the earth rising over the moon's disk, are all scenes with which we are familiar, because the printed word was supplemented by brilliant photography. Thus, the first question a news editor asks about a possible story

is "Can you get any good pix?" Some tabloids, such as the *Daily News* ("New York's Picture Newspaper") actually depend on photography for a good part of their copy.

The *Stanford Daily* while not a tabloid has always relied on photographs to help tell a story. *Daily* photographers, because of their unique status as students working among students, have often had access to a story that, for one reason or another, was denied to photographers from other newspapers.

As a specific example of this, I can cite my experience in covering the occupation of the Stanford Computation Center by radical students in February, 1971. The students who had occupied Pine Hall were reluctant to allow any photographers on the premises. By identifying myself as a *Daily* photographer, I was able to gain access to the building in order to take pictures from the roof when the Santa Clara County Deputies arrived. I could not have taken the photos had I not been a *Daily* photographer. Only one other newspaper photographer was on the roof of that building, and he was also from the *Daily*. We were the only photographers considered "legitimate" and "trustworthy" by the demonstrators (although we have repeatedly published pictures which were not particularly helpful to their cause).

As a *Daily* photographer, I have often been in the middle of some heated confrontations. On more than one occasion I have found myself in a no-man's land between a line of angry and scared demonstrators and a line of angry and scared police. When I cover

a demonstration, violent or non-violent, my press card, enclosed in a clear plastic case and pinned to my left breast, is my only protection, from both sides.

Since the search of the *Daily, Daily* photographers, including myself, have been threatened while covering campus demonstrations. My roommate, Joseph Berman (a *Daily* photographer also) was threatened and harassed while covering a small campus demonstration, the day after the search.

On the afternoon of June 29, 1971, I had occasion to be present in the lobby of the East Wing of Encina Hall when that lobby was being occupied by several dozen persons protesting the dismissal of five University employees for alleged misconduct at the time of the April 9 Stanford Hospital sit-in. I was present in the lobby as part of my function as a photographer for the Summer *Stanford Daily*. My press card was pinned to my left shirt pocket, and was clearly visible.

At approximately 4:58 p.m. a confrontation took place between Provost William Miller and one of the demonstrators. Provost Miller informed the demonstrators that they would have to leave the building at 5:00 p.m. or face arrest. I took several photographs of this discussion.

After I had taken many pictures, and as the 5:00 p.m. deadline approached, one of the demonstrators, a young woman dressed in a white lab coat, leaned over to me and asked me to stop taking pictures. I refused. She asked me why. I answered that I was

a member of the press, that it was my job to take pictures, and that I would continue to do so. I indicated Bob Litterman, who was standing behind me and to my left, told her that he was my editor, and that if she liked, she could talk to him about it—if he told me to stop taking pictures, I would stop.

About fifteen seconds later a man approached me from across the lobby. To my best recollection, the following conversation ensued:

Man: I saw you taking pictures of them. I was standing back there and I think you took pictures of me. I don't want my picture taken.

Me: Then don't stand there.

Man: You shouldn't be taking those pictures. I don't want my picture taken. Please stop taking pictures.

Me: No.

Man: I want you to give me your film.

Me: No.

Man: I want you to give me that film, and I want you to stop taking pictures.

Me: I'm not going to give you the film.

Man: Why are you taking pictures? Don't you know the pigs will use them. You're helping the Red Squad with their case against every one in this room.

Me: That's ridiculous. They (the demonstrators) can't be prosecuted for doing this.

Man: What do you mean they can't?

Me: They're not doing anything illegal. That's ridiculous. I work for the *Stanford Daily*. We don't give pictures to anyone. Every picture I take goes to

the office. No one else gets it. The only pictures they see are the ones in the paper. This is my editor (indicating Litterman). You can discuss it with him.

Man: I'll stop you from taking any more pictures.

Me: How?

Man: It's very easy (places hand lightly over lens).

Me: If you touch me I'll press charges or if you touch my camera I'll press charges. I'll have you up for assault.

Litterman: I'm the editor of the *Summer Daily*. Our policy is not to turn our pictures over to the police, and if you harm one of our photographers we are prepared to press charges. We won't allow you to censor us.

At this point a demonstrator approached us and stated that "The *Stanford Daily* is good, they burn the stuff."

Another demonstrator appeared and said that we had turned over photographs of the Hospital demonstration to the police. Litterman responded that we had turned over nothing. The demonstrator said that our office had been searched, and Litterman and I pointed out that the police in fact seized nothing, and that the *Daily* would never voluntarily give photographs to the police.

Although I was not harassed any further, and some of the demonstrators apologized, I am convinced that the fact of the search did not make taking photographs any easier. I am further convinced that it is only the belief on the part of campus demonstra-

tors that the police will not have access to *Daily* photographs that permits us to cover the news. It is also clear to me that the search by the police only makes it more difficult to convince demonstrators that the *Daily* is not, and will not become, an adjunct of any law enforcement agency.

/s/ Steven G. Ungar
Steven G. Ungar

(Jurat omitted in printing)

In the United States District Court
for the Northern District of California

[Title Omitted in Printing]

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[Filed Jul 7, 1972]

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In the United States District Court
for the Northern District of California

[Title Omitted in Printing]

AFFIDAVIT OF CRAIG BROWN REGARDING
THE MOTION FOR SUMMARY JUDGMENT

I, CRAIG BROWN, being sworn, state:

1. I am a deputy district attorney for the County of Santa Clara, State of California, and one of the defendants in the above entitled action.

2. While employed in that capacity in October of 1969, I had occasion to have contact with representatives of the Stanford Daily. At that time, I was involved in the prosecution of Steven Kessler, Case No. 86/30419, in the Municipal Court for the Palo Alto-Mountain View Judicial District, County of Santa Clara, State of California. A Subpoena Duces Tecum had been served on the Stanford Daily for the production of any photographs, films, or negatives relating to the Steven Kessler prosecution. The Stanford Daily moved to quash the subpoena, and a hearing was held on October 23, 1969, at which Mr. Mark Weinberger, Editor of the Stanford Daily, testified. Mr. Kessler was being prosecuted for crimes arising out of demonstrations in May of 1969, in the area of the Stanford Research Institute in Palo Alto. The subpoena required the Stanford Daily to produce all photographs and negatives in its possession and control taken by or for the Stanford Daily in the area of the Stanford Research Institute on May 16 and May 19, 1969.

3. After viewing the contact sheets produced by Mr. Weinberger, I and my colleague, Alexander Singleton, were of the definite opinion that the contact sheets and/or the films from which they had been produced were incomplete and that a number of photographs, in our opinion those which should have been incriminating, had been deleted. The contact sheets produced by Mr. Weinberger were of absolutely no value to the prosecution except for already published photographs.

4. The testimony of Mr. Weinberger convinced my office that the Stanford Daily either would not or could not respond to a request or to a Subpoena Duces Tecum for the production of photographs, films, or negatives which might be incriminating. Mr. Weinberger had testified that he could name only two of four of his photographers who had taken the pictures on the days in question and that he could not state how many photographs were taken by these photographers. His testimony indicated that the Stanford Daily had little or no control over its photographers, over the film used by its photographers, or over the negatives and photographs which might be produced from that film, or submitted to the Stanford Daily by stringer photographers for possible publication. He testified that essentially there was no way he could determine the whereabouts of any particular picture or negative. He testified further that practically any person, whether or not he was a member of the Stanford Daily, could have access to the negative files and that, with regard to the negatives, photographs, and

contact sheets in question, the defendant in a related criminal case had been given full access to these materials with the permission of Mr. Weinberger. He testified that the Stanford Daily loses negatives "quite often" and that it often "mismarks" negatives. He explained that not all of the students working on the Stanford Daily are highly reliable.

5. Mr. Arnie Folkadahl had also been served with a Subpoena Duces Tecum for similar photographs, and the motion to quash apparently was made on his behalf also by the attorney for the Stanford Daily. Mr. Folkadahl produced a package of six strips of six negatives each, plus a lone seventh negative. Mr. Folkadahl identified himself as a free lance photographer who was "stringing for a local newspaper in the capacity of a news reporter." He testified that on the days in question he had taken close to 800 pictures. With regard to the pictures taken of the incidents in question, Mr. Folkadahl testified that he could not produce at least one roll of film because it had been stolen from the "darkroom at Stanford". Another group of pictures he considered dangerous to have around, so in the early part of August he mailed them to a certain individual in Tokyo who would not be back in the United States until the following August. A third set of negatives, he testified, were scattered throughout his belongings and he had not been able to locate them.

6. From the above-stated experience with the Stanford Daily and one of the photographers who apparently was working for the Stanford Daily, my office

was of the definite opinion that not only would the Stanford Daily strongly resist any Subpoena Duces Tecum but also that, if served with such a subpoena, the Stanford Daily would destroy or remove any incriminating photographs from its premises. This belief was strengthened by the fact that, some time prior to April, 1971, the Stanford Daily issued a policy statement indicating that it would not retain any potentially incriminating photographs, which policy became known to my office.

7. Between October, 1969, and April, 1971, there were many disruptions at Stanford University and in Palo Alto. All of these disruptions were investigated by the District Attorney's Office. Due to its known policy, no effort was made by law enforcement agencies to obtain photographic evidence from the Stanford Daily, and such evidence was usually obtainable from police agencies or it could be obtained in the usual cooperative and easy manner from other news media.

8. With regard to the incident at the Stanford University Hospital on April 9, 1971, the Stanford Daily had published many pictures of the hospital incident in a special edition on April 11, 1971. A copy of this edition was obtained by the Palo Alto Police and by the District Attorney's Office. The Palo Alto Police Department indicated that no police photographers were located at the east end of the hospital corridors where many felonious assaults upon police officers occurred, and that while most photographers and news reporters were located at the western end

of the corridor with the main police force, that some Stanford Daily photographers may have worked their way to the opposite end.

9. Any photographic evidence in the possession of the Stanford Daily relating to these assaults would have constituted evidence tending to show the commission of a felony. Prior experience in prosecuting cases arising out of demonstrations such as the one at the Stanford University Hospital has shown that photographic evidence is absolutely critical. It is used to aid eyewitnesses and victims in making crucial identifications, because few arrests are normally made at the scene. It also provides independent tangible evidence of the actual crimes.

10. Given the situation which confronted law enforcement representatives on April 12, 1971, it would seem clear that issuance of a subpoena duces tecum would have constituted an impractical and illegal course to pursue. The past experience of the Palo Alto Police and Santa Clara County District Attorney's Office with the Stanford Daily, as reflected in the Municipal Court hearing of 1969, indicated that representatives of the paper could not completely comply with such a process. The admitted policy of the Stanford Daily subsequent to that hearing (which policy was known to local law enforcement) further indicated that its representatives would take affirmative action to thwart such a proceeding by deliberately destroying pictures which might tend to incriminate anyone. Further, a subpoena duces tecum could not have legally issued at that time since under Cali-

ifornia Penal Code Section 1326-1327 a subpoena can issue only when there is a criminal action set to be tried. In the existing situation on April 12, 1971, no complaints had even been filed, nor any trial date scheduled. To delay efforts to obtain photographic evidence until after criminal complaints had been filed would have only given representatives of the Stanford Daily additional time in which to carry out their cynical efforts to thwart the judicial process. A good faith reading of California Penal Code Section 1524(4) would have led to the conclusion that it represented a proper legal procedure by which evidence of the commission of a felony could be sought, in the words of the statute, "... from any place, or from any person in whose possession it may be."

11. The above stated matters are of my personal knowledge. If I were called as a witness in this action, I could competently testify to all of the above stated facts.

/s/ Craig Brown
Craig Brown

(Jurat omitted in printing)

In the United States District Court
for the Northern District of California

[Title Omitted in Printing]

**AFFIDAVIT OF RICHARD HENRY PEARDON
REGARDING THE MOTION FOR
SUMMARY JUDGMENT**

**I, RICHARD HENRY PEARDON, being sworn,
state:**

1. I am one of the defendants in the above-entitled action.

2. I am employed as a police officer by the City of Palo Alto, California, and have been so employed for approximately four (4) years.

3. I was so employed and on duty as a police officer on April 12, 1971, between the hours of 5:00 p.m. and 7 p.m.

4. At approximately 5:50 p.m. on April 12, 1971, I and three other Palo Alto police officers, namely Officer Deisinger, Officer Martin, and Officer Bonander, went to the offices of the Stanford Daily, located in the Storke Student Publications Building, Stanford, California, to execute a search warrant issued that day.

5. Said search warrant directed us "to make immediate search of the premises of *Stanford Daily*, consisting of offices and rooms within the Stokes [sic] publications building, located at Stanford University, County of Santa Clara, State of California, for the personal property described as follows: 1)

Negatives of films taken at Stanford University Hospital on the evening of April 9, 1971, showing the Sit-In at the Hospital and following events. 2) The film used while taking pictures at Stanford University Hospital on April 9, 1971, showing the Sit-In and following events. 3) Any pictures which display the events and occurrences at Stanford University Hospital on the evening of April 9, 1971."

6. We were accompanied by one member of the Stanford University Police Department, who was to act as a liaison between us and Stanford University if needed. This officer did not participate in any manner in the execution of said search warrant or in the search of the offices of the Stanford Daily to the best of my knowledge. This officer had no authorization from me to participate in any manner in the search of the offices of the Stanford Daily pursuant to said search warrant.

7. I have no knowledge that any other member of the Stanford University Police Department was present during the course of our search of the offices of the Stanford Daily.

8. During the course of the search of the offices of the Stanford Daily, I viewed essentially four separate rooms comprising the offices of the Stanford Daily. The room identified as the photography laboratory was in a fairly orderly condition, but I found photographs among other materials in the trash container. In the remaining three rooms, many different types of materials were scattered on desk tops, table tops, and cabinet tops and in desk drawers, cartons,

and filing cabinet drawers in an extremely disorganized and disorderly fashion. Photographs were interspersed among printed and written materials in an apparently random manner.

9. During the course of the search of the offices of the Stanford Daily, I looked through only unlocked drawers as well as on desk tops, table tops, and similarly open areas for the items described in said search warrant. There were several locked desk drawers and filing cabinet drawers, but these locked areas remained locked throughout the entire course of the search to the best of my knowledge.

10. I looked carefully only at pictures, negatives, and film I discovered in order to determine whether they came within the scope of said search warrant.

11. I glanced only very briefly at all other materials in order to determine whether they were pictures, negatives, or film or whether pictures, negatives, or film were concealed among them. At no time did I read all or any part of, or in any way (except as above-stated) scrutinize any materials which were not pictures, negatives, or film. My perusal of such materials was so brief that I could not have described what materials I looked at or any portion of the contents thereof.

12. During the entire course of my search of the offices of the Stanford Daily, I was carefully and closely watched by at least one and sometimes more persons who apparently were staff members of the Stanford Daily, I was photographed numerous times,

and I was subjected to harassing comments by said persons. At no point during the course of my search of the offices of the Stanford Daily did anyone present say or infer that the materials being looked through were confidential materials.

13. I attempted to replace any materials looked through in the same condition as I found them.

14. To the best of my knowledge, the time actually spent searching the offices of the Stanford Daily was approximately fifteen minutes.

15. To the best of my knowledge, Officer Martin did not participate in the search of the offices of the Stanford Daily in any manner. The search was carried out by only three officers of the Palo Alto Police Department.

16. If I were called as a witness in the above-entitled action, I could competently testify to all of the above-stated facts.

/s/ Richard Henry Peardon
Richard Henry Peardon

(Jurat omitted in printing)

In the United States District Court
for the Northern District of California

[Title Omitted in Printing]

AFFIDAVIT OF DONALD EZRA MARTIN
REGARDING THE MOTION FOR
SUMMARY JUDGMENT

I, DONALD EZRA MARTIN, being sworn, state:

1. I am one of the defendants in the above-entitled action.

2. I am employed as a police officer by the City of Palo Alto, California, and have been so employed for approximately six (6) years.

3. I was so employed and on duty as a police officer on April 12, 1971, between the hours of 5:00 p.m. and 7 p.m.

4. At approximately 5:50 p.m. on April 12, 1971, I and three other Palo Alto police officers, namely Officer Deisinger, Officer Peardon, and Officer Bonander, went to the offices of the Stanford Daily, located in the Storke Student Publications Building, Stanford, California, to execute a search warrant issued that day.

5. Said search warrant directed us "to make immediate search of the premises of Stanford Daily, consisting of offices and rooms within the Stokes [sic] Publications Building, located at Stanford University, County of Santa Clara, State of California, for the personal property described as follows: 1) Negatives of films taken at Stanford University Hospital on the evening of April 9, 1971, showing the Sit-In at

the Hospital and following events. 2) The film used while taking pictures at Stanford University Hospital on April 9, 1971, showing the Sit-In and following events. 3) Any pictures which display the events and occurrences at Stanford University Hospital on the evening of April 9, 1971."

6. We were accompanied by one member of the Stanford University Police Department, who was to act as a liaison between us and Stanford University if needed. This officer did not participate in any manner in the execution of said search warrant or in the search of the offices of the Stanford Daily to the best of my knowledge. This officer had no authorization from me to participate in any manner in the search of the offices of the Stanford Daily pursuant to said search warrant.

7. During the course of our search of the offices of the Stanford Daily, another member of the Stanford University Police Department arrived at the scene. To the best of my knowledge, he merely looked around and immediately left the scene. To the best of my knowledge, he did not participate in any manner in the execution of said search warrant or in the search of the offices of the Stanford Daily. He had no authorization from me to participate in any manner in the search of the offices of the Stanford Daily pursuant to said search warrant.

8. I did not participate in any manner in the actual search of the offices of the Stanford Daily. Rather, I mainly stood in the hallway between the various offices of the Stanford Daily and watched the

progress of the search and the various people who were present in said offices and hallway.

9. In viewing the essentially four rooms which comprised the offices of the Stanford Daily, I noticed that many different types of materials were scattered on desk tops, table tops, and cabinet tops in an extremely disorganized, disorderly, and apparently illogical fashion.

10. To the best of my knowledge, the three officers who conducted the actual search of the offices of the Stanford Daily looked through only unlocked drawers as well as on desk tops, table tops, and similarly open areas.

11. To the best of my knowledge, said three officers looked carefully only at pictures, negatives, and film.

12. To the best of my knowledge, said three officers glanced only very briefly at all other materials which were not pictures, negatives, or film.

13. During the entire course of the search of the offices of the Stanford Daily, said three officers were closely and carefully watched by anywhere from one to six or more persons who apparently were staff members of the Stanford Daily, they were photographed numerous times, and they were subjected to harassing comments by said persons. To the best of my knowledge, at no point during the course of the search of the offices of the Stanford Daily did anyone present say or infer that the materials being looked through were confidential materials.

14. To the best of my knowledge, the time actually spent searching the offices of the *Stanford Daily* was approximately 15 minutes.

15. If I were called as a witness in the above-entitled action, I could competently testify to all of the above-stated facts.

/s/ Donald Ezra Martin
Donald Ezra Martin

(Jurat omitted in printing)

—
In the United States District Court
for the Northern District of California

[Title omitted in printing]

**AFFIDAVIT OF JIMMIE DAVE BONANDER
REGARDING THE MOTION FOR
SUMMARY JUDGMENT**

I, JIMMIE DAVE BONANDER, being sworn, state:

1. I am one of the defendants in the above-entitled action.

2. I am employed as a police officer by the City of Palo Alto, California, and have been so employed for approximately eight (8) years.

3. I was so employed and on duty as a police officer on April 12, 1971, between the hours of 5:00 p.m. and 7:00 p.m.

4. At approximately 5:50 p.m. on April 12, 1971, I and three other Palo Alto police officers, namely Officer Martin, Officer Peardon, and Officer Deisinger,

went to the offices of the *Stanford Daily*, located in the Storke Student Publications Building, Stanford, California, to execute a search warrant issued that day.

5. Said search warrant directed us "to make immediate search of the premises of *Stanford Daily*, consisting of offices and rooms within the Stokes [sic] Publications Building, located at Stanford University, County of Santa Clara, State of California, for the personal property described as follows: 1) Negatives of films taken at Stanford University Hospital on the evening of April 9, 1971, showing the Sit-In at the Hospital and following events. 2) The film used while taking pictures at Stanford University Hospital on April 9, 1971, showing the Sit-In and following events. 3) Any pictures which display the events and occurrences at Stanford University Hospital on the evening of April 9, 1971."

6. We were accompanied by one member of the Stanford University Police Department, who was to act as a liaison between us and Stanford University if needed. This officer did not participate in any manner in the execution of said search warrant or in the search of the offices of the *Stanford Daily* to the best of my knowledge. This officer had no authorization from me to participate in any manner in the search of the offices of the *Stanford Daily* pursuant to said search warrant.

7. I have no personal knowledge at this time that any other member of the Stanford University Police Department was present during the course of our search of the offices of the *Stanford Daily*.

8. During the course of the search of the offices of the *Stanford Daily*, I viewed essentially four separate rooms. With the exception of the room identified as the photography laboratory, I saw many different types of materials scattered on desk tops, table tops, and cabinet tops in an extremely disorganized and disorderly fashion in the remaining rooms. Materials in desk drawers and filing cabinet drawers were also disorganized and disorderly. Photographs were interspersed among printed and written materials in an apparently random manner. Photographs were discovered among other papers in trash containers.

9. During the course of the search of the offices of the *Stanford Daily*, I looked through only unlocked drawers as well as on desk tops, table tops, and similarly open areas for the items described in said search warrant. There were several locked desk drawers and filing cabinet drawers, but these locked areas remained locked throughout the entire course of the search to the best of my knowledge.

10. I looked carefully only at pictures, negatives, and film I discovered in order to determine whether they came within the scope of said search warrant.

11. I glanced only very briefly at all other materials in order to determine whether they were pictures, negatives, or film or whether pictures, negatives, or film were concealed among them. At no time did I read all or any part of, or in any way (except as above-stated) scrutinize any materials which were not pictures, negatives, or film. My perusal of such ma-

terials was so brief that I could not have described what materials I looked at or any portion of the contents thereof.

12. During the entire course of my search of the offices of the *Stanford Daily*, I was carefully and closely watched by at least one or more persons who apparently were staff members of the *Stanford Daily*, I was photographed numerous times, and I was subjected to harassing comments by said persons. At no point during the course of my search of the offices of the *Stanford Daily* did anyone present say or infer that the materials being looked through were confidential materials.

13. I attempted to replace any materials looked through in the same condition as I found them.

14. To the best of my knowledge, the time actually spent searching the offices of the *Stanford Daily* was approximately 15 minutes.

15. To the best of my knowledge, Officer Martin did not participate in the search of the offices of the *Stanford Daily* in any manner. The search was carried out by only three officers of the Palo Alto Police Department.

16. If I were called as a witness in the above-entitled action, I could competently testify to all of the above-stated facts.

/s/ Jimmie Dave Bonander
Jimmie Dave Bonander

(Jurat omitted in printing)

In the United States District Court
for the Northern District of California

[Title omitted in printing]

AFFIDAVIT OF PAUL JOSEPH DEISINGER
REGARDING THE MOTION FOR
SUMMARY JUDGMENT

I, PAUL JOSEPH DEISINGER, being sworn,
state:

1. I am one of the defendants in the above-entitled action.

2. I am employed as a police officer by the City of Palo Alto, California, and have been so employed for approximately ten (10) years.

3. I was so employed and on duty as a police officer on April 12, 1971, between the hours of 5:00 p.m. and 7:00 p.m.

4. At approximately 5:50 p.m. on April 12, 1971, I and three other Palo Alto police officers, namely Officer Martin, Officer Bonander, and Officer Peardon, went to the offices of the *Stanford Daily*, located in the Storke Student Publications Building, Stanford, California, to execute a search warrant issued that day.

5. Said search warrant directed us "to make immediate search of the premises of *Stanford Daily*, consisting of offices and rooms within the Stokes [sic] Publications Building, located at Stanford University, County of Santa Clara, State of California, for the personal property described as follows: 1) Negatives

of films taken at Stanford University Hospital on the evening of April 9, 1971, showing the Sit-In at the Hospital and following events. 2) The film used while taking pictures at Stanford University Hospital on April 9, 1971, showing the Sit-In and following events. 3) Any pictures which display the events and occurrences at Stanford University Hospital on the evening of April 9, 1971."

6. We were accompanied by one member of the Stanford University Police Department, who was to act as a liaison between us and Stanford University if needed. This officer did not participate in any manner in the execution of said search warrant or in the search of the offices of the *Stanford Daily* to the best of my knowledge. This officer had no authorization from me to participate in any manner in the search of the offices of the *Stanford Daily* pursuant to said search warrant.

7. I have no personal knowledge at this time that any other member of the Stanford University Police Department was present during the course of our search of the offices of the *Stanford Daily*.

8. During the course of the search of the offices of the *Stanford Daily*, I viewed three separate rooms. With the exception of the room identified as the photography laboratory, I saw many different types of materials scattered on desk tops, table tops, and cabinet tops in an extremely disorganized and disorderly fashion. My search of the offices of the *Stanford Daily* was limited to the photography laboratory and

its adjoining office. I recall searching a filing cabinet full of negatives, some apparently belonging to other student publications, and the tops of table-like furniture. I do not recall searching in any desk drawers, nor did I search in any area that was locked. I also looked through trash containers in these two rooms. I believe that photographs were interspersed among printed and written materials that I looked through.

9. I looked carefully only at pictures, negatives, and film I discovered in order to determine whether they came within the scope of said search warrant.

10. I glanced only very briefly at all other materials in order to determine whether they were pictures, negatives, or film or whether pictures, negatives, or film were concealed among them. At no time did I read all or any part of, or in any way (except as above-stated) scrutinize any materials which were not pictures, negatives, or film. My perusal of such materials was so brief that I could not have described what materials I looked at or any portion of the contents thereof.

11. During the entire course of my search of the offices of the *Stanford Daily*, I was carefully and closely watched by at least one and up to six persons who apparently were staff members of the *Stanford Daily*, I was photographed numerous times, and I was subjected to harassing comments by said persons. At no one point during the course of my search of the offices of the *Stanford Daily* did anyone present say

or infer that the materials being looked through were confidential materials.

12. I attempted to replace any materials looked through in the same condition as I found them.

13. To the best of my knowledge, the time actually spent searching the offices of the *Stanford Daily* was approximately 15 minutes.

14. To the best of my knowledge, Officer Martin did not participate in the search of the offices of the *Stanford Daily* in any manner. The search was carried out by only three officers of the Palo Alto Police Department.

15. If I were called as a witness in the above-entitled action, I could competently testify to all of the above-stated facts.

/s/ Paul Joseph Deisinger
Paul Joseph Deisinger

(Jurat omitted in printing)

In the United States District Court
for the Northern District of California

[Title omitted in printing]

AFFIDAVIT OF ALLAN ARTHUR BOWRA
REGARDING MOTION FOR SUMMARY
JUDGMENT

I, ALLAN ARTHUR BOWRA, being sworn,
state:

1. I am employed as a police officer by the City of Palo Alto, California, hold the rank of lieutenant, and was so employed and on duty on April 9, 1971.

2. On that date, I was in charge of two arrest teams consisting of a total of eleven officers. Upon our arrival at the Stanford Hospital I took my arrest teams up the stairs to the westerly side of the administration offices. The double doors into the administration offices hallway were barricaded by the demonstrators and locked with a chain by them. The glass in and round the doors was covered with papers, plastic, and furniture, making it virtually impossible for me to view the demonstrators inside the barricaded area.

3. Chief Zurcher spoke to the demonstrators through the closed double doors. At approximately 6:00 p.m. Assistant Chief Anderson advised the demonstrators twice with the bullhorn that their actions constituted violations of the law and they were given five minutes to leave the area or face arrest. His statements followed those of Mr. Frank Vitale, hospital administrator, who advised the group to leave.

4. A wooden battering ram was furnished by the hospital, and our officers attempted to force the double doors open with it to no avail. Glass partitions in the door and along the side of the door were broken out, and the demonstrators used a fire hose to pour water out through the broken areas. Missiles were then thrown apparently by the demonstrators and Officer Garner was hit by a missile and he fell to the floor. He was then removed to a safer area.

5. Onlookers were behind us in the west corridor, and some apparently were not supportive of our efforts. They apparently posed a threat to our safety and Assistant Chief of Police Anderson twice read a warning to them to clear the corridor. Arrest Team No. 1 was assigned to move those onlookers westerly passed [sic] the glass doors to our rear. This was accomplished but the officers had to remain to present [sic] them from reentering the corridor.

6. Several squads of Santa Clara County sheriff's deputies arrived. Ropes were then tied to the barricaded doors. By pulling on one door, sufficient access was gained to permit both [sic] cutters to be inserted, and the chain was cut. The second door was then removed and Squad A and the two arrest teams entered the occupied area amid debris being thrown by the demonstrators. The demonstrators exited through the east doors where Sergeant Monasmith and his squad were stationed. By the time I arrived at the east doors, the conflict which had ensued there had ceased.

7. The above facts are stated on my personal knowledge. If I were called as a witness in this action I could competently testify to the above stated facts.

/s/ Allan Arthur Bowra
Allan Arthur Bowra

(Jurat omitted in printing)

In the United States District Court
for the Northern District of California

[Title omitted in printing]

**AFFIDAVIT OF ROBERT MONASMITH
REGARDING MOTION FOR SUMMARY
JUDGMENT**

I, ROBERT MONASMITH, being sworn, state:

1. I am employed as a police officer by the City of Palo Alto, hold the rank of sergeant, and was so employed and on duty on April 9, 1971.

2. On that date, I was assigned to the B Squad consisting of nine police officers. The B Squad was detailed to the Stanford University Hospital to secure and hold the east double doors to the administration offices on the second floor. On our arrival at this area, I deployed my eight men into two ranks of four—one rank facing the double doors and the other rank facing the group in the hall to protect the rear.

3. At the east double doors, many items of office furniture, such as filing cabinets, chairs, tables, had been pushed against the inside of the doors as a

barricade. There appeared to be about 10 to 15 persons manning this barricade, and they were physically pushing against the barricade to hold it tight against the doors. I also noted that newspapers and paper banners were affixed against the inside glass of the doors and adjacent glass doors so as to block the view of the inside. However, one portion of the papers had come loose and a small view of the area inside the doors could be had.

4. A tape recorder microphone was held constantly against the center crack in the double doors, and the recorder was kept on until a later point in time when the recorder was thrown or knocked to the floor and the microphone was broken.

5. I could hear noises from the west door, which indicated that an effort was being made by the police officers to gain access to the office area with a battering ram. Each time the battering ram hit the doors, the group inside would yell "hold that line". I also heard the group inside yelling to the group standing to our rear in the corridor to do something to help them. The group inside also called to the individuals in the corridor, urging them to go out around the campus and the hospital and do what they could. A short time thereafter, the group in the corridor diminished somewhat to approximately 10 to 15 persons. A short while later, the group in the corridor had regained its original size.

6. During most of the time that I was stationed at the east doors, there was not much activity in my immediate area. Slogans and obscenities were shouted

at various times by the demonstrators in the barricaded area.

7. Suddenly, I was aware that the people inside of the east doors were very rapidly removing the barricade on the inside of the door. From all indications it appeared that they were going to come out. Prior to this, one of the officers in the line commented that, "they've armed themselves with clubs and sticks". I immediately attempted to advise the commanding officer or any one on the radio of this development. I had some difficulty in getting through, and by the time that I did get through, the barricade had been removed, the doors had been flung open, and the whole group of people attacked our line. To the best of my knowledge, I instructed my men to hold the demonstrators where they were.

8. I drew my baton and went into the line to assist. I believe I began to push the crowd with my baton in a horizontal position, and then I was struck on the right upper arm and fell to the floor. As I tried to rise, I was hit three times on the helmet, which knocked the face shield and cover off. Each time I tried to rise from the floor, I was hit on the head. When I did regain my footing, I was struck repeatedly on the left shoulder area. By that time it was obvious to me that we would have to fight to fend off the attacking demonstrators.

9. Some of the demonstrators got through the line and ran down the corridor. As I was attempting to stop one of the demonstrators, I was struck from the rear.

10. At that time I was not able to identify any of the demonstrators who had assaulted me.

11. Upon my return to the previously barricaded area, I observed Agent Eberlein standing off to one side holding his left hand. It was obvious that he was badly injured. I then saw that Officer Savage was also badly hurt.

12. It should be made very clear that prior to the violence that ultimately ensued, the officers assigned to B Squad made a very definite and concerted effort to hold their assigned position with the proper usage of the baton. The batons were initially held by them at a "high port" position, and they were pushing against the group coming out of the doors. This line and position was held for a period of approximately four to five seconds before the demonstrators brought their clubs and sticks into positive use. Then it became a situation wherein each officer had to fend off blows and protect himself.

The above facts are stated on my personal knowledge. If I were called as a witness in the above-entitled action, I could competently testify to all of the above-stated facts.

/s/ Robert Monasmith
Robert Monasmith

(Jurat omitted in printing)

In the United States District Court
for the Northern District of California

[Title omitted in printing]

AFFIDAVIT OF CLARENCE ANDERSON
REGARDING MOTION FOR SUMMARY
JUDGMENT

I, CLARENCE ANDERSON, being sworn, state:

1. I am the Assistant Chief of Police of the City of Palo Alto and have been employed as a police officer for the City of Palo Alto for thirty years.

2. I was so employed and on duty April 9, 1971. On that date at approximately 10:30 a.m., I met with Chief of Police James C. Zurcher, Dr. John L. Wilson, Director of Stanford University Medical Center, and Frank R. Vitale, Deputy Director of Stanford University Hospital. Also present were Mr. James Siena, Stanford University attorney, and other hospital personnel. Dr. Wilson stated that numerous persons had occupied the hallway and administrative offices of the second floor of the Stanford University Medical Center since approximately 1:00 pm. on April 8, 1971. Dr. Wilson stated that the presence of such persons was disruptive to the operation of the hospital and interfered with patient care. He stated that the numbers fluctuated between 35 and 125 persons depending upon the time of day or night. He further stated that he wanted the group removed and the area cleared.

3. Mr. Vitale stated that he was authorized by the owners of the hospital to make any official an-

nouncements to clear the area. This statement was verified by Mr. William Miller, acting president of Stanford University.

4. It was agreed at that meeting the Palo Alto Police Department would take action to clear the area at approximately 6:00 p.m. on April 9, 1971, in the event the group was still occupying the administrative offices and the hallway.

5. At approximately 5:45 p.m. on April 9, 1971, police personnel arrived at the second floor of the Stanford University Medical Center adjacent to the administrative offices. At that time, the large double glass doors at each end of the hall adjacent to the administrative offices were chained in a closed position and barricades of desks, tables, chairs, and other miscellaneous materials were stacked against the inside of the doors by the demonstrators to prevent entry.

6. At approximately 5:50 p.m., the Chief of Police James C. Zurcher approached the barricaded doors at the west end of the corridor and requested to speak with Willie Newberry. A voice from inside the barricaded area indicated "there is nobody named Willie in here". Chief Zurcher stated then that the police were going to bring the demonstrators out but wanted to do so as peacefully as possible. A person from inside the barricaded area replied, "There is a lot of expensive stuff in here and we're going to get it. People out there are going to get hurt." Zurcher replied, "Then I understand you don't want to come out."

7. Just prior to 5:55 p.m., the following announcement was read by Mr. Frank Vitale, "I am Frank Vitale and I represent the owner of these premises. You are not welcome here and are causing a disturbance. I request that you leave immediately and if you do not I shall ask for your arrest."

8. Immediately thereafter, I read the following statement, "I am Assistant Chief Anderson and I represent the Police Department. You have been requested to leave by the owner of this property, and your failure to do so constitutes a trespass. I demand you in the name of the people of the State of California to disburse [sic], and if you do not, you shall be arrested for violation of Penal Code Section 407, Unlawful Assembly, Penal Code Section 409, Refusal to Disperse, and Section 602 of the Penal Code, Trespass. You have five minutes to leave the hospital area." This statement was immediately repeated a second time. The statements read by Mr. Vitale and myself were made over a power voice megaphone placed against a crack in the doors as the statements were read.

9. At the end of two minutes the group within the barricaded area was advised they had three minutes to leave. They were again advised they had two minutes to leave; then one minute; and finally that five minutes had passed. Replies from inside the barricaded area indicated that the people therein had heard and understood the announcements. At the end of the five minute period when there was no response or effort on the part of the group to leave

the area, instructions were given to the police officers to force entry into the barricaded area.

10. According to the records in my possession, fourteen (14) Palo Alto police officers were injured seriously enough in subsequent assaults by the demonstrators to warrant medical attention. The total cost for said injuries was estimated to be in excess of Fourteen Thousand Dollars (\$14,000.00) as of June 4, 1971. The records indicate that only two of the demonstrators who had inflicted said injuries could be identified.

11. I am informed that many other police officers were also assaulted and battered by the demonstrators but did not require more than immediate medical attention.

12. The above facts are stated on my personal knowledge. If I were called as a witness in the above-entitled matter, I could competently testify to the above-stated fact.

/s/ Clarence Anderson
Clarence Anderson

(Jurat omitted in printing)

In the United States District Court
for the Northern District of California

[Title omitted in printing]

**AFFIDAVIT OF J. E. GARNER REGARDING
MOTION FOR SUMMARY JUDGMENT**

I, J. E. GARNER, being sworn, state:

1. I am employed as a police officer by the City of Palo Alto, California, and was so employed and on duty on April 9, 1971.

2. On that date, I was assigned to Squad A in an effort to handle a group disturbance at Stanford Hospital. The initial assignment was located outside the administration building known as Boswell Building. Our squad was met by a very hostile group of people, many of them apparently hospital personnel.

3. Within the hospital, there was a barricaded area. The doorway was blocked by desks and filing cabinets and various papers were taped on the window glass. Several attempts were made by my squad to force entry into the "held" area after the announcements by Assistant Chief Anderson by the group to disburse [sic]. A battering ram was used with little success. However, once we broke out the glass in the doors, numerous objects were thrown at us. I was struck by a thrown metal object. The impact was sufficient for me to lose consciousness. I was not able to identify the person who threw the object at me from the barricaded area.

4. I state the above facts on my personal knowledge. If I were called as a witness in this matter, I could competently testify to the above stated facts.

/s/ J. E. Garner
J. E. Garner

(Jurat omitted in printing)

In the United States District Court
for the Northern District of California

[Title omitted in printing]

**AFFIDAVIT OF
FRANK RICHARD BENADERET REGARDING
MOTION FOR SUMMARY JUDGMENT**

I, FRANK RICHARD BENADERET, being sworn, state:

1. I am employed as a police officer by the City of Palo Alto, California, and was so employed and on duty on April 9, 1971.

2. On that date I was assigned to Arrest Team 2 at Stanford University Hospital. My position was at the west end of the second floor of Boswell Building. My function was to move into the occupied area and to peacefully arrest the demonstrators who remained at the scene of the unlawful assembly. At that time, the doors leading into the west side of the administration wing were closed and barricaded with a great

amount of office furniture stacked behind the door. The doors were chained closed from the inside.

3. After Assistant Chief Anderson gave the warnings regarding the unlawful assembly and five minutes for the demonstrators to disburse [sic], no one had emerged through the west doors. Thereafter, a group of our officers used a battering ram to break down the doors to the sit-in area. They were unsuccessful at first. The officers then broke out the glass adjacent to the locked double doors. Immediately, heavy missiles were thrown by the demonstrators through the glass at the officers. Simultaneously a fire hose from within the occupied area was turned on and turned on the officers at the opening of the glass break. The force of the water caused the shattered glass to break further, and much of it flew into the area where the police officers were assembled. Officer Garner was hit in the chest by one of the first missiles thrown through the opening in the glass. He had been hit with a heavy metal scotch tape dispenser. Just after Officer Garner was knocked to the floor, an approximately one foot length of two-inch cast iron sewer pipe was thrown within the occupied area. My opinion, is that if an individual had been hit with that pipe, which was thrown with tremendous force, he would have suffered great bodily harm or death.

4. While the above stated activities were going on, a group of 30 to 40 people who apparently were sympathetic to the demonstrators were standing approximately four feet away from the rear of our lines. They began shouting support for the demon-

strators and profanities at the officers. They were asked to leave, and they refused. Anderson then declared to that group that they also constituted an unlawful assembly. They were walked back to an area approximately 100 feet further to the rear on the other side of another set of double doors.

5. When the doors leading to the sit-in area were fully opened, the police officers climbed over the barricades and into the occupied area. I followed with our arrest team and found the demonstrators fleeing through the east side of the area. The occupied area was found to be in complete shambles; broken furniture, glass, and extensive debris were on the floor. All of the offices and the hallway areas within the occupied area were completely demolished as evidenced by partitions between offices having been torn down, telephones having been ripped from the walls, filing cabinets having been dumped and thrown to the ground, and the floors being littered with papers, files, books, and broken furniture.

6. It was reported to me that, while officers of the arrest team were walking arrested persons to the transportation buses, the officers were bombarded with large rocks and other missiles. It was reported that at least one door window of the bus had been broken completely by the thrown rocks. Inside of the occupied area a poster indicating "kill a pig" was found taped to the wall in the hallway and a red flag was tacked above the double doors.

The above facts are stated on my own personal knowledge. If I were called as a witness in this ac-

tion, I could competently testify to all of the above-stated facts.

/s/ Frank Richard Benaderet
Frank Richard Benaderet

(Jurat omitted in printing)

In the United States District Court for the
Northern District of California

[Title Omitted in Printing]

**AFFIDAVIT OF MELVILLE A. TOFF IN
OPPOSITION TO THE MOTION FOR
SUMMARY JUDGMENT**

I, MELVILLE A. TOFF, being first duly sworn,
state:

That I am one of the attorneys for defendants in the above-entitled action. That I have reviewed the affidavits in support of the motion for summary judgment filed by Edward Kohn, Charles Lyle, Fred Mann, Don Tollefson and Steven Ungar, and, there are alleged factual statements made in each of said affidavits, which I am not in a position to controvert without the opportunity to depose these individuals, and complete necessary discovery in connection with matters set forth in said affidavits.

It is important for the defendants, through discovery procedures, to elicit, among other things, the relationship of Stanford University to the Stanford Daily, the relationship of each of the plaintiffs to the

Stanford Daily and to the University, whether or not plaintiffs or any of them have the legal capacity or right to maintain this suit, whether or not, the Stanford Daily is in fact a newspaper of general circulation, the editorial contents and policies of the Stanford Daily, the person or persons who control the policy or policies of the paper, the source of revenue of the Stanford Daily, whether or not, in fact, any academic credit is received by students working on the paper from the Stanford University for their work on the Stanford Daily, whether or not, in fact, any persons affiliated with the Stanford University or its officers control, supervise or have any say whatsoever in the editorial policy of the Stanford Daily, or its management, the extent of coverage of news activities of the Stanford Daily and the extent to which it disseminates its information, the photographers that were present from the Stanford Daily on April 8, 1971 and April 9, 1971 at the sit-in demonstrations, involved in this suit, the number of photographs and the ownership of the photographs and/or negatives taken at said demonstration, the extent to which the Stanford Daily members consider themselves free to dispose of or destroy unpublished materials or photographs including incriminating evidence and evidence covered by a judicially authorized process or warrant, together with whether any such destruction has ever occurred, the extent to which the members of the Stanford Daily hold an allegedly [sic] position of trust among radical groups, how and in what manner the members of the Stanford Daily have been able to

cover news of actions more closely and more accurately than any of the other media in the area, as alleged, the extent and nature of the alleged disruption of activities allegedly caused by the Palo Alto Police Department, the amount of the alleged confidential information laying around the Daily offices at the time of the search, the subject matter of this lawsuit, how and in what manner the ability of the staff members to function as reporters has been diminished as alleged, how or in what manner or to what extent has the newsgathering function of the Stanford Daily been impaired by any search or threat of future searches as alleged, the alleged items of correspondence and in particular the nature of such correspondence that any of the police officers allegedly reviewed, how or in what manner the policy of the Stanford Daily helped to extricate photographers from difficult situations as alleged, how, or in what manner or to what extent or by what persons, and in what manner, the Stanford Daily members have been threatened while covering campus demonstrations together with the alleged reasons for said threats and/or harassments.

The foregoing is a partial list of the factual matters that I hope to develop with discovery procedures, and after development of the foregoing information through the normal and allowable discovery procedures, I will then, on behalf of defendants, be in a position to more adequately prepare the defense of this action and oppose the motion for summary judgment.

WHEREFORE, this affiant respectfully requests the Court to deny plaintiffs motion for summary judgment, or in the alternative, continue the motion until such time as the defendants have the opportunity to complete the discovery necessary to properly prepare a defense to this action.

/s/ Melville A. Toff
Melville A. Toff

(Jurat omitted in printing)

United States District Court
Northern District of California

No. C-71 912 RFP

The Stanford Daily, Felicity A. Barringer,
Fred Mann, Edward H. Kohn, Richard
Lee Greathouse, Robert Litterman, Hall
Daily and Steven G. Ungar,

Plaintiffs,

vs.

James Zurcher, individually and as Chief of
Police of the City of Palo Alto, County
of Santa Clara, State of California, James
Bonander, Paul Deisinger, Donald Martin,
and Richard Peardon, all individually and
as Police Officers of the City of Palo Alto,
County of Santa Clara, State of California,
Louis P. Bergna, individually and as Dis-
trict Attorney for the County of Santa
Clara, State of California, Craig Brown,
individually and as Deputy District Attor-
ney for the County of Santa Clara, State
of California,

Defendants.

[Filed Nov. 14, 1972]

JUDGMENT

This cause came on to be heard on motion of the
plaintiffs for summary judgment pursuant to Rule 56
of the Federal Rules of Civil Procedure, and the

court having read the pleadings on file and considered
the affidavits of plaintiffs in support of the motion
and the affidavits of the defendants in opposition
thereto, and the court having heard the argument of
counsel, and due deliberation having been had thereon,
and the court having prepared and filed a Memorandum
and Order on October 5, 1972,

IT IS HEREBY ORDERED, ADJUDGED AND
DECREED that there is no genuine issue as to any
material fact and that plaintiffs are entitled to judgment
as a matter of law against each and all of the
defendants (other than defendant J. Barton Phelps,
as to whom a stipulated Dismissal With Prejudice
has been filed by plaintiffs) in conformity with the
Memorandum and Order granting declaratory relief
previously filed by the court herein on October 5,
1972.

Dated: Nov. 14, 1972

/s/ Robert F. Peckham
United States District Judge

United States District Court
Northern District of California

No. C-71 912 RFP

<p>The Stanford Daily, et al., James Zurcher, individually and as Chief of Police of the City of Palo Alto, County of Santa Clara, State of California, et al.,</p>	<p>Plaintiffs, vs. Defendants.</p>
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[Filed Dec. 15, 1972]

DISMISSAL WITH PREJUDICE

Upon the instance of plaintiffs, and good cause appearing and no showing having been made that defendant Phelps acted other than in good faith in discharging his judicial responsibility.

It Is Hereby Ordered that the action is dismissed with prejudice as to defendant J. Barton Phelps, sued herein individually and as Judge of the Municipal Court of Palo Alto-Mountain View Judicial District, Santa Clara County, State of California.

Dated: Dec. 15, 1972

/s/ Robert F. Peckham
United States District Judge

In the United States District Court
Northern District of California

No. C-71 912 RFP

<p>The Stanford Daily, Felicity A. Barringer, Fred Mann, Edward H. Kohn, Richard Lee Greathouse, Robert Litterman, Hall Daily and Steven G. Ungar,</p>	<p>Plaintiffs, vs.</p>
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<p>James Zurcher, individually and as Chief of Police of the City of Palo Alto, County of Santa Clara, State of California, James Bonander, Paul Deisinger, Donald Martin, and Richard Peardon, all individually and as Police Officers of the City of Palo Alto, County of Santa Clara, State of California, Louis P. Bergna, individually and as Dis- trict Attorney for the County of Santa Clara, State of California, Craig Brown, individually and as Deputy District Attor- ney for the County of Santa Clara, State of California, J. Barton Phelps, individ- ually and as Judge of the Municipal Court of the Palo Alto-Mountain View Judicial District, Santa Clara County, State of California,</p>	<p>Defendants.</p>
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[Filed Dec. 15, 1972]

ORDER SETTING ASIDE AND VACATING JUDGMENT

Whereas, a Judgment in this matter was heretofore executed and filed on November 14, 1972, and entered on record on November 16, 1972, and

Whereas, said Judgment prematurely dismissed the claim against defendant J. Barton Phelps, and

Whereas, said Judgment did not reflect a determination of the issue of award of attorneys fees prayed for by plaintiffs; and

Whereas, the Defendants and Plaintiffs herein have requested and stipulated that said Judgment be vacated and set aside.

Now, Therefore, For Good Cause, it is hereby ordered that the Judgment heretofore signed and filed on November 14, 1972, and entered on record on November 16, 1972, be, and the same is, hereby set aside and vacated.

December 14, 1972.

/s/ Robert F. Peekham

Judge of the United States District Court

(Jurat omitted in printing)

In The United States District Court For The Northern District Of California

[Title omitted in printing]

[Filed Apr. 16, 1973]

NOTICE OF MOTION AND MOTION TO DISMISS COMPLAINT OR FOR SUMMARY JUDGMENT

To: Plaintiffs And Their Attorneys Of Record:

Please Take Notice that on Tuesday, May 29, 1973, at 2:30 p.m., or as soon thereafter as counsel can be heard, in the Courtroom of the Honorable Robert F. Peckham, United States Court House, Courtroom No. 1, 175 W. Taylor, San Jose, California, defendants James Zurcher, James Bonander, Paul Deisinger, Donald Martin, and Richard Peardon will move the Court for an order dismissing the complaint herein under Rule 12(b)(6), Federal Rules of Civil Procedure, on the ground that the same fails to state a claim against said defendants upon which relief can be granted, or in the alternative to grant summary judgment for said defendants under Rule 56, Federal Rules of Civil Procedure, on the ground that there is no genuine issue as to any material fact and the moving defendants are entitled to a judgment as a matter of law.

This motion will be based on the records and files herein, this Notice of Motion and Motion to Dismiss Complaint or For Summary Judgment, and the

Memorandum of Points and Authorities attached hereto.

Dated, April 16, 1973.

/s/ Peter G. Stone by Marilyn Taketa
Peter G. Stone, one of the attorneys for defendants Zurcher, Bonander, Deisinger, Martin, and Peardon

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United States District Court
Northern District of California

[Title omitted in printing]

AFFIDAVIT OF JEROME B. FALK, JR.

State of California
City and County of San Francisco—ss.

JEROME B. FALK, JR., being first duly sworn, deposes and says:

1. I am a partner in the firm of Howard, Prim, Rice, Nemerovski, Canady & Pollak, and the partner in charge of the above litigation. Associated with me in this litigation from my firm are Robert H. Mnookin (who, effective November 1, 1972, has become Of Counsel to this firm and a Professor of Law at the University of California School of Law at Berkeley) and Franklin R. Garfield.

2. Co-Counsel in the above litigation is Anthony G. Amsterdam, Professor of Law at Stanford University School of Law. Although we have attempted wherever possible to spare Professor Amsterdam the day-to-day mechanical details of the litigation, he has been intimately involved with every significant aspect of the case since its inception.

3. Our firm was retained by the plaintiffs in this case with the understanding that our services would be rendered at our firm's customary hourly rates. My time is presently billed at the rate of \$65 per hour; during earlier phases of the case, it was billed at the rate of \$55 per hour. Mr. Mnookin's time, prior to

his departure, was billed at the rate of \$55 per hour. Mr. Garfield's time is billed at the rate of \$50 per hour. The expenditure of time as reflected on the books of our firm (which are based upon the daily records of each attorney), and the total amounts attributable thereto, respecting this litigation through January 31, 1973, are as follows:

<i>Attorney</i>	<i>Hours</i>	<i>Amounts</i>
Falk	149.75	\$ 8,325.00
Mnookin	291.90	\$16,054.50
Garfield	<u>68.75</u>	<u>\$ 3,437.50</u>
	510.40	\$27,817.00

4. Although Professor Amsterdam does not keep precise time records, he conservatively estimates that he has expended not less than 75 hours with respect to this matter. I am of the opinion that a reasonable hourly rate for his services would be not less than \$80 per hour. Because Professor Amsterdam does not expect to be compensated for his services in this litigation, the instant application does not reflect the value of his efforts and is thus approximately \$6,000 less than would in fact be justified.

5. The amount of time which plaintiffs' counsel were compelled to expend greatly exceeded that which we had estimated. We had, from the outset, perceived this case as presenting several straightforward, if novel, questions of constitutional law. Although at first at least one of defendants' counsel seemed to share that conception and indicated his view that a stipulation of facts would be an appropriate means of presenting those questions to the Court, our expecta-

tations were wholly frustrated. The unhappy chronicle of costly delaying tactics which ensued is partially set forth in my previous Affidavit of June 14, 1972, submitted in support of our Motion for Protective Order, and that Affidavit is incorporated herein by reference. Defendants' professed willingness to enter into a stipulation as to the facts caused us to attend at least four conferences with opposing counsel in Palo Alto (and one pre-trial conference with Your Honor), only to be met by defendants' counsels' unexplained refusal to enter into a stipulation previously agreed upon coupled with efforts to depose all of the plaintiffs. These matters were, of course, exceedingly costly (in terms of requiring plaintiffs' counsel to expend substantial amounts of time to deal with them). Counsel were also compelled to expend a substantial amount of time dealing with defendants' motions to convene a three-judge court or to abstain. Although it would be possible for me to ascertain with reasonable precision those fees directly attributable to defendants' delaying tactics in these various respects, I have not attempted to do so. I believe a fair estimate is that the fees were at least \$12,000 more than they would have been had defendants in fact approached this litigation in the constructive fashion they indicated would be followed at its outset.

6. I am always reluctant to characterize the motives of any party or its counsel. It is, I believe, fair to say as an objective matter that the history of defendants' conduct of this litigation would be difficult to square with a good faith desire on their

part that the important questions of law raised thereby be presented for disposition without undue delay. That persons whose constitutional rights have been violated should have to incur legal fees of more than \$27,000 (or even more, where one member of the legal team is not donating his services as Professor Amsterdam did) simply to obtain a summary judgment on undisputed facts is a discouraging commentary on the availability of legal remedies.

/s/ Jerome B. Falk, Jr.
Jerome B. Falk, Jr.

(Jurat omitted in printing)

United States District Court
Northern District of California

[Title omitted in printing]

[Filed Mar. 30, 1973]

SUPPLEMENTAL AFFIDAVIT OF
JEROME B. FALK, JR.

State of California
City and County of San Francisco—ss.

JEROME B. FALK, JR., being first duly sworn,
deposes and says:

1. It may well be that the court neither requires nor expects any reply or supplementary evidence concerning defendants' unseemly comments concerning my law firm, the truthfulness of our time records as

reflected in my previous affidavit, and the integrity of plaintiffs' counsel (Defendants' Opposition, at pp. 24-26). For the sake of the completeness of the record—and because I frankly resent defendants' unsupported and totally unwarranted comments—I submit this supplementary affidavit.

2. Defendants profess to be "truly amazed" that my law firm would expect to charge for its services at its customary hourly rates (*Id.* at p. 24). I have some difficulty in grasping the notion that counsel should be paid *less* for services rendered in connection with a case involving important questions of public significance than, say, defending a personal injury case. (That argument would have greater credibility in defendants' mouths were Mr. Toff to advise us that he had reduced his customary charges to the client he represents in this matter.)

3. Defendants' further comments suggesting that either our firm has taken advantage of "a college newspaper and college students" or that plaintiffs have "substantial outside financial sources" require reply. As stated in my previous affidavit, the legal fees have vastly exceeded those originally contemplated—an unhappy circumstance which I attribute to the conduct of this litigation by defendants and their counsel. Although I consider it totally irrelevant to the present motion, and indeed I heretofore hesitated to mention it lest we appear immodest, the fact of the matter is that my law firm has no intention of requiring the *Daily* to pay legal fees beyond its ability to do so. We did not undertake the prosecution

of this particular matter on a *pro bono publico* basis (although, as I am sure the court knows, we undertake many matters without expectation of compensation); unhappily, because the costs of this litigation have so completely exceeded the ability of the *Daily* to pay, it appears to have taken on that character.

4. I do not propose to dignify defendants' comments concerning my hourly charges. I do wish to respond to the statement that "per-hour rates of \$50 for an inexperienced research attorney . . . are outrageously high." (*Id.* at p. 24). Without detailing the qualifications and experience of members of this firm, I note only that \$50 per hour is the *lowest* recommended hourly fee set fourth in the San Francisco Lawyers' Club Minimum Fee Schedule.

5. Defendants state that the total time expended by attorneys in my firm "seems somewhat inflated." (*Id.* at p. 25). This motion has been pending for some time; had they the slightest real doubt about my veracity, they were free to take my deposition. They pose several questions which I am happy to answer:

(a) Students from Stanford did assist in fact gathering. No charge has been made for their efforts. Law students clerking in our firm did significant amounts of research on the case; however, I frankly felt that their efforts in this instance were not entirely productive, and no charge has been made for their efforts.

(b) None of the time reported has anything whatsoever to do with any case but this one. Our firm is not involved in any other comparable

case; and none of Professor Amsterdam's time has been charged.

(c) No time devoted to luncheon has been charged; and travel time has been, as a general matter, adjusted to exclude the greater travel time to San Jose over a trip to a San Francisco court.

(d) Almost without exception, the out-of-state affidavits submitted by plaintiffs were prepared by persons other than attorneys in my firm, and thus no time has been charged to them.

(e) I cannot allocate my time between that devoted to one legal theory and another.

(f) The problems generated by Judge Phelps have largely been the burden of Professor Amsterdam, with whom Judge Phelps frequently communicated directly (always, it should be added, at his instigation).

/s/ Jerome B. Falk, Jr.
Jerome B. Falk, Jr.

(Jurat omitted in printing)

United States District Court
Northern District of California

[Title omitted in printing]

AFFIDAVIT OF
ROBERT H. MNOOKIN

ROBERT H. MNOOKIN, being duly sworn,
deposes and says:

1. I am an attorney admitted to practice before this Court. I was an associate with the firm of Howard, Prim, Rice, Nemerovski, Canady & Pollak from July 1, 1970 until October 31, 1972, when I joined the law faculty at the University of California, Berkeley (Boalt Hall) and became "Of Counsel" to the firm. Since April, 1971, I have been one of the attorneys for plaintiffs in this action. I submit this Affidavit in support of Plaintiffs' Motion for an Award of Attorneys' Fees.

2. Based on my monthly time records prepared contemporaneously, I have determined that I devoted a total of 290.7 hours to this litigation since April, 1971. I am confident this total is accurate.

3. From my monthly time summary, daily calendar and review of the files in this case, I have allocated my time among the particular matters I worked on in this case. Although my records do not permit me to make this allocation with accuracy down to the exact number of minutes I spent on each matter, I believe the following allocation is reasonably precise:

*Factual Investigation into the Circumstances
of the Search (April and May, 1971)* *Hours*

Meetings with members of the editorial staff of the Stanford Daily; interviews with witnesses; interviews with officials of Stanford University regarding relationship of Stanford Daily to the University; preparations of statements by witnesses 77.0

Preparation of Complaint (April and May 1971)
Legal research; drafting of complaint 43.0

*Intra-District Transfer of Venue
(May and June, 1971)*
Preparation of affidavit and motion for intra-district transfer of venue; hearing on motion 3.7

*Defendants' Motion to Dismiss or Stay Action
and Request for the Convening of a Three-
Judge Court (June-September, 1971)*
Preparation of Plaintiffs' response: legal research; memorandum of points and authorities; attendance at hearing on motion 62.0

*Negotiations Over Stipulation of Facts
(October, 1971—May, 1972)*
Pre-trial conference; meetings with opposing counsel; preparation and revision of proposed stipulation of facts; telephone discussions with opposing counsel; consultation with clients 49.0

Motion for Protective Order (June, 1972)
Discussions with clients with regard to Defendants' Notice of Depositions; preparation

of Motion For Protective Order and review
of supporting affidavit 8.0

Plaintiffs' Motion for Summary Judgment
(December, 1971; June-July, 1972)

Preparation of motion: legal research; memorandum of Points and authorities; interviews; preparation of affidavits in support of motion; attendance at hearing; research for and preparation of reply memorandum 44.0

Miscellaneous (October, 1972)

Discussions with clients following Court's decision to grant motion for summary judgment 4.0

TOTAL 290.7

/s/ Robert H. Mnookin
Robert H. Mnookin

(Jurat omitted in printing)

United States District Court
Northern District of California

[Title omitted in printing]

AFFIDAVIT OF FRANKLIN R. GARFIELD

FRANKLIN R. GARFIELD, being duly sworn, deposes and says:

1. I am admitted to practice before this Court, an associate with the firm of Howard, Prinn, Rice, Nemerovski, Canady & Pollak, and one of the attor-

neys for plaintiffs in this action. I submit this affidavit in support of plaintiffs' motion for an award of attorneys' fees.

2. Since October, 1972, and based on my monthly time records, I have devoted 235.0 hours to this litigation. My time during this period has been allocated as follows:

	<i>Hours</i>
<i>Judgment</i>	
Preparation of Judgment; designation of record on appeal; discussions with opposing counsel; legal research; stipulation dismissing defendant Phelps; stipulation vacating judgment	7.5

Plaintiffs' Motion for Attorneys' Fees

Preparation of motion for attorneys' fees: legal research; memo of points and authorities	61.8
Preparation of reply; legal research; memo of points and authorities	29.3

Defendants' Motion to Dismiss or For Summary Judgment

Preparation of response: legal research; memo of points and authorities	38.4
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Plaintiffs' Motion for Preliminary Injunction

Preparation of motion: investigation of search of Stanford University psychiatry clinic; interviews; preparation of affidavits; order shortening time; memo of points and authorities	46.7
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*Plaintiffs' Motion for Award of
Attorneys' Fees*

Preparation of motion: legal research; memo of points and authorities; affi- davits	21.9
---	------

Miscellaneous

Administrative: discussions with clients; opposing counsel; consultation with other attorneys; review of recent legal developments	29.4
---	------

TOTAL	235.0
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3. While the total of my time for this case is exact, it has been necessary for me to reconstruct from my daily calendar the time I devoted to the particular matters listed above. I have done this as carefully as possible, but I cannot determine with mathematical certainty the precise number of minutes I spent on each of these matters.

/s/ Franklin R. Garfield
Franklin R. Garfield

(Jurat omitted in printing)

[Filed Sep. 28, 1973]

FRIDAY, September 28th, 1973

PRESENT:

HONORABLE ROBERT F. PECKHAM,
U. S. District Judge

Ramon E. Xavier, Clerk

Roberta Rogers, Court Reporter

UNREPORTED—MINUTE ORDER

C-71-912 RFP—THE STANFORD DAILY, et al

vs.

JAMES ZURCHER, et al

It Is Hereby Ordered And Adjudged that because the District Attorney assures the Court that the *Daily* will not be the object of a Third Party Search, the Motions for Preliminary Injunction, is DENIED.

This ruling is without prejudice to any claim arising out of the search of the Stanford Medical Center later being arrested in another action. Further, that the later search is not the subject of the instant action.

It Is Further Ordered And Adjudged that the Motion of defendant Palo Alto Police parties, is DENIED.

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In the Supreme Court

OF THE
United States

OCTOBER TERM, 1977

Nos. 76-1484, 76-1600

JAMES ZURCHER, et al., *Petitioners,*

VS.

THE STANFORD DAILY, et al., *Respondents.*

LOUIS P. BERGNA, et al., *Petitioners,*

VS.

THE STANFORD DAILY, et al., *Respondents.*

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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FILED

JUL 29 1977

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IN THE SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1977

Nos. 76-1484, 76-1600

JAMES ZURCHER, et al.
Petitioners,

vs.

THE STANFORD DAILY, et al.,
Respondents.

On Petition For a Writ of Certiorari
to the United States
Court of Appeals for the Ninth Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinions below are repro-
duced in the Petitions.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petitions.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved are set forth in the Petitions.

STATEMENT

These petitions seek review of a judgment of the Court of Appeals For the Ninth Circuit, which affirmed a judgment of the United States District Court for the Northern District of California (Hon. Robert J. Peckham). The District Court granted Respondents' motion for summary judgment on the merits (Pet. App. "C", 353 F.Supp. 124), ^{1/} thereafter granted Respondents' motion for an award of attorneys' fees (Pet. App. "D", 366 F.Supp. 18), and fixed the amount of those fees at \$47,500 (Pet. App. "E", 64 F.R.D. 680). The Court of Appeals affirmed (Pet.

^{1/} The appendices in the two petitions herein are identical, even as to pagination. References to the body of each petition will be cited as "Bergna Pet." in No. 76-7600 and as "Zurcher Pet." in No. 76-1484.

App. "A"), and a petition for rehearing was denied (Pet. App. "B").

The controversy concerns a search of the offices of The Stanford Daily, a student-published newspaper at Stanford University, conducted by Petitioners pursuant to a search warrant issued by the Municipal Court for the Palo Alto-Mountain View Judicial District. (I C.T. 14-17.) The ostensible purpose of the search was to locate and obtain certain photographs of a demonstration believed to be in the Daily's unpublished photograph files. (Id.) It is undisputed that at the time of the search Petitioners had no cause to believe that anyone connected with the Daily was involved in unlawful activity, that unlawful activity was being conducted at the Daily's offices, or that contraband was being stored there. See 353 F.Supp., at 127, Pet. App., at 12.

On Monday, April 12, 1971, at approximately 5:45 p.m., four of the Petitioners appeared at the offices of the Daily and, pursuant to the warrant, proceeded to search its offices. (II C.T. 291, 295.) During the course of the search, the officers examined filing cabinets, the contents of desks, shelves and wastebaskets. (I C.T. 350-51, at Para. 15; IIIA C.T. 923-25, at Paras. 2-5, 937-39.) The desks contained, and thus the officers were in a position to see, notes taken by reporters in the course of interviews

conducted for the purposes of gathering news, some of which contained information given in confidence and on the express understanding that the name of the source would not be disclosed. (IIIA C.T. 900-901, at Para. 25; id. 925, at Para. 6.) The officers were in a position to see and examine business and personal correspondence of the Daily and members of its staff (IIIA C.T. 925, Para. 5; id., 939; I C.T. 351, Para. 21), although they now maintain that none was actually read. It is undisputed that the search did not locate any unpublished photographs of the demonstration in question, and no materials were seized. 353 F.Supp., at 127, Pet. App., at 13.

Uncontroverted affidavits presented to the District Court established the adverse impact that this search had on the Daily's ability to gather news. In addition, affidavits of experienced and prominent journalists from around the country demonstrated the profoundly chilling effect which such a search would have on the ability of a journalistic organization to carry out its functions. In summary, they established that (1) such a search totally disrupts the newsgathering and disseminating activities of a paper; (2) to the extent confidential material is revealed (or even perceived by others to be vulnerable to such disclosure), vital sources of news will be impaired and access to events will be blocked; (3) materials not the object of the

search--some of which may be highly confidential--are subjected to entirely unnecessary exposure despite the lack of any governmental interest in such inspection; (4) unlike the issuance of a subpoena or subpoena duces tecum, the ex parte issuance and execution of a search warrant deprives the newspaper and newsman of an opportunity for judicial control; (5) such a search jeopardizes a newspaper's credibility; and (6) such a search creates a substantial risk of self-censorship.

Upon this record, the District Court granted Respondents' Motion for Summary Judgment. It held that the Fourth Amendment--considered in light of the especially stringent standards required for searches which threaten to invade First Amendment interests--rendered unlawful Petitioners' search of The Stanford Daily offices. The District Court wrote:

"The basic question in this case is whether third parties--those not suspected of a crime--are entitled to the same, if not greater, protection under the Fourth Amendment than those suspected of a crime. More specifically, are law enforcement agencies required to explore the subpoena duces tecum alternative before obtaining a search warrant

against third parties for materials in their possession? . . . [T]he Court holds that third parties are entitled to greater protection, particularly when First Amendment interests are involved. It is the Court's belief that unless the Magistrate has before him a sworn affidavit establishing proper cause to believe that the materials in question will be destroyed, or that a subpoena duces tecum is otherwise "impractical", a search of a third party for materials in his possession is unreasonable per se, and therefore violative of the Fourth Amendment." (353 F.Supp., at 127, Pet. App., at 14).

The District Court's reason for applying especially stringent Fourth Amendment standards to the search involved in the present case appears in subsequent portions of the District Court's opinion:

"The other aspect of defendants' argument--that newspapers, reporters and photographers have no greater Fourth Amendment protections than other citizens--is also without merit. The First Amendment is not superfluous.

Numerous cases have held that the First Amendment "modifies" the Fourth Amendment to the extent that extra protections may be required when First Amendment interests are involved. See, e.g., A Quantity of Books v. Kansas, 378 U.S. 205, 84 S.Ct. 1723, 12 L. Ed.2d 809 (1964); Marcus v. Search Warrants, 367 U.S. 717, 81 S.Ct. 1708, 6 L.Ed.2d 1127 (1961); Demich, Inc. v. Ferdon, 426 F.2d 643 (9th Cir. 1960), vacated and remanded on other grounds, 401 U.S. 990, 91 S.Ct. 1223, 28 L.Ed.2d 528 (1971); Bethview Amusement Corp. v. Cahn, 416 F.2d 410 (2nd Cir. 1969), cert. denied, 397 U.S. 920, 90 S.Ct. 929, 25 L.Ed.2d 101 (1970). See also NAACP v. Alabama, 357 U.S. 449 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958)." (353 F.Supp., at 134, Pet. App., at 30-31).

At the time of its original decision on the merits, the District Court declined to enjoin similar future searches by Petitioners, expressing its belief that they would comply with the legal principles set forth in its decision. 353 F.Supp., at 136, Pet. App., at 35-36. It added that "in the unlikely event that defendants do conduct such a search against plaintiffs

in the future, plaintiffs are free to renew their motion for a permanent injunction." Id. The District Court also awarded Respondents the sum of \$47,500 in attorneys' fees. 366 F.Supp. 18, 64 F.R.D. 680, Pet. App. "D" and "E".

The Court of Appeals affirmed. That court adopted in its entirety the opinion of the District Court on the merits. Pet. App. at 2. Accordingly, the Court of Appeals' opinion discusses only certain procedural issues raised on appeal by Petitioners, some of which are now the subject of these petitions. Thus the Court of Appeals rejected the contention that Petitioners' professed good faith insulates them from declaratory relief; found the Civil Rights Attorneys' Fees Awards Act (hereafter called "the Act") applicable to cases pending on appeal at the time of its passage; and concluded that the Act applied to cases such as this one.

ARGUMENT

I.

THE FOURTH AND FIRST AMENDMENT ISSUE DECIDED BELOW PRESENTS NO QUESTION WARRANTING THIS COURT'S REVIEW

Plainly, the merits of this controversy between the Stanford Daily and local law enforcement officials do not warrant review by this Court. The only legal proposition involved is the

general rule that any search which is unreasonable under all the facts and circumstances of the situation violates the Fourth Amendment. "[T]he question here is not whether the search was authorized by state law. The question is rather whether the search was reasonable under the Fourth Amendment." South Dakota v. Opperman, 428 U.S. 364, 372 (1976), quoting Cooper v. California, 386 U.S. 58, 61 (1967) (emphasis added by Opperman). "The test of reasonableness cannot be fixed by per se rules; each case must be decided on its own facts." Id. at 373, quoting Coolidge v. New Hampshire, 403 U.S. 443, 509-510 (1971) (Mr. Justice Black, concurring and dissenting).

"A seizure reasonable as to one type of material in one setting may be unreasonable in a different setting or with respect to another kind of material." Roaden v. Kentucky, 413 U.S. 496, 501 (1973). Under the obvious principle of Roaden, the District Court for the Northern District of California here was plainly correct in taking the view that "[t]he First Amendment is not superfluous . . . to the extent that extra [Fourth Amendment] protections may be required when First Amendment interests are involved." 353 F.Supp. at 134, Pet. App., at 30 (original emphasis).

This court has also repeatedly so held. E.g., Stanford v. Texas, 379 U.S. 476,

484-485 (1965). The District Court properly applied that established notion to condemn the present case of unnecessary rummaging through the files and editorial offices of a campus newspaper, and the Court of Appeals affirmed it for doing so.

Petitioners seek to inflate this decision into a "ruling that would work a drastic change in the traditional, nationwide practice of issuing search warrants on probable cause to believe that seizable items are in a particular place" (Bergna Pet., at 8) -- a ruling of "public importance and far-reaching effect . . . by its nature unconditional and sweeping . . . [constituting an] unprecedented extension of the Fourth Amendment's . . . language . . . applicable to the federal government and the states in all warrant contests" (Zurcher Pet., at 7). These extravagant and alarmist protestations simply ignore the District Court's careful application of the First and Fourth Amendments together in the context of this particular case. They would have amazed the District Court below, which expressly refused in this very case to extend its ruling beyond the immediate context of a newspaper office search; 2/ and they would have boggled

2/ Following the entry of the District Court's decision and opinion on the merits of this case, local

the Ninth Circuit, which did not find the case sufficiently vexing or far-reaching to warrant the writing of its own opinion on the merits of the Fourth and First Amendment controversy.

2/ continued.

police conducted a search of patients' files in the psychiatric clinic of the Stanford University Hospital pursuant to a search warrant that plainly did not conform to the requirements of the District Court's ruling regarding newspaper office searches. Respondents (plaintiffs below) promptly moved for a preliminary injunction on the basis of this incident. In the words of the District Court (64 F.R.D. at 684, Pet. App., at 61):

"This motion, which was made after a declaratory judgment had been entered . . . , evidently was triggered by plaintiffs' fear that a police search of the Stanford Hospital evidenced defendants' intention to violate the spirit if not the letter of the court's judgment. The motion was denied by minute order -- but only after defendant Bergna represented to the court that defendants would not engage in searches of the premises of newspapers. The minute order . . . referred to this representation."

Of course we do not contend that the case lacks novel features. The fact situation which gave rise to it is thankfully rare, and required the District Court to apply general, settled, unquestionable Fourth Amendment doctrines in an unusual context. But petitioners' efforts to rip the District Court's decision out of that context and to project it vastly into other very different settings is improvident. Petitioners ask this Court not merely to "entertain constitutional questions in advance of [any] necessity" for doing so, Parker v. County of Los Angeles, 338 U.S. 327, 333 (1949), but also to consider those questions upon a record that does not squarely present or adequately focus them.

II.

THE GRANTING OF DECLARATORY RELIEF BELOW PRESENTS NO ISSUE MERITING REVIEW BY THIS COURT

The Zurcher Petition asserts that it was improper for the District Court to grant declaratory relief against Petitioners because they assertedly did not act in bad faith. It characterizes the District Court's decision as "a 'no fault' theory." Zurcher Pet., at 9-11. This contention is not repeated in the Bergna Petition.

Review in this Court is certainly unnecessary to consider this contention. Police officers have a

qualified immunity from the imposition of money damages where they have acted in good faith. Pierson v. Ray, 386 U.S. 547, 555-58 (1967). But this Court has never held or even intimated that the conduct of police officers or other public officials not provably in bad faith is beyond the scrutiny of courts in cases seeking injunctive or declaratory relief. Petitioners cite no case in support of this remarkable proposition, and an unbroken line of decisions by this Court from Ex Parte Young, 209 U.S. 123 (1908) to Linmaric Associates, Inc. v. Township of Willingboro, ___ U.S. ___, 52 L.Ed.2d 155 (1977) allows injunctive relief (to say nothing of the less drastic remedy of declaratory relief afforded in this case) against governmental officials where damages might not be available. As the Court of Appeals said, "[e]xtensions of [the qualified immunity] rule to suits like the present one, seeking injunctive and declaratory relief, has been rejected by the courts." Pet. App. "A", at 3, citing Rowley v. McMillan, 502 F.2d 1326, 1332 (4th Cir. 1974); Hodge v. Hedrick, 391 F.Supp. 91 (E.D. Va. 1974), Wood v. Stickland, 420 U.S. 308, 315 n.6 (1975); National Treasury Employees Union v. Nixon, 492 F.2d 587, 609 (D.C. Cir. 1974); Gouge v. Joint School Dist. No. 1, 310 F.Supp. 984, 990 (W.D. Wis. 1970); Richmond Black Police Officers Ass'n v. City of Richmond, 386 F.Supp. 151, 154 (E.D. Va. 1974); Saffron v. Wilson, ___ F.Supp. ___ (D.D.C. decided Jan. 2, 1975); Safeguard Mutual Ins.

Co. v. Miller, 472 F.2d 732, 734 (3d Cir. 1973). 3/ In addition to the cases cited by the Court of Appeals, see Peek v. Mitchell, 419 F.2d 575, 578

3/ We are uncertain whether Petitioner Zurcher means here to repeat his contention, advanced in the Court of Appeals, that because he assertedly did not personally participate in the search of the Daily, he may not be made a defendant in an action for injunctive or declaratory relief. The contention, of course, is inapplicable to the four police officers who conducted the search or to District Attorney Brown, who obtained the warrant. In any event, the contention is without merit.

Zurcher is the Chief of Police of the City of Palo Alto. The issue of his alleged non-involvement was not raised in the District Court before summary judgment was granted, and the record contains no evidence substantiating that claim. Moreover, the search was conducted by his subordinates, whose authority derives from him, and whose past conduct was and future conduct will be subject to his direction. Zurcher's alleged non-participation would doubtless be relevant to the question of damages, but

(6th Cir. 1970); United States v. Clark, 249 F.Supp. 720, 727 (S.D. Ala. 1965).

III.

THE AWARD OF ATTORNEYS' FEES INVOLVES NO ISSUE WARRANTING THIS COURT'S REVIEW

Petitioners complain of the award of attorneys' fees under the Civil Rights Attorneys' Fees Awards Act, 42 U.S.C. §1988, last sentence ("the Act"). They argue that the Act should not have been applied to this case, which was pending on appeal to the Court of Appeals at the time of its

3/ continued.

here the District Court awarded no damages and, indeed, even refrained from issuing an injunction. It merely declared the rights of the Daily in relation to the District Attorney and the Palo Alto Police Department, and it was in that connection that Chief Zurcher was properly named as a defendant. Langford v. Gelston, 364 F.2d 197, 205 (4th Cir. 1966); Hernandez v. Noel, 323 F.Supp. 779, 783 (D. Conn. 1970); Houser v. Hill, 278 F.Supp. 920, 928-29 (M.D. Ala. 1968); Cottonreader v. Johnson, 252 F.Supp. 492, 499 (M.D. Ala. 1966).

passage, and that in any event fees may not be awarded against an unsuccessful defendant who enjoys absolute immunity from an award of money damages, or qualified immunity from damages unless there has been a finding that the defendant had acted in bad faith. Neither of these contentions presents an issue meriting the grant of certiorari.

A. Congress Intended the Act to Apply to Pending Cases.

Congress explicitly demonstrated its intent that the Act apply to pending cases and authorize the award of fees for services rendered prior to the Act's effective date. The Report of the House Judiciary Committee unambiguously states:

"In accordance with applicable decisions of the Supreme Court, the bill is intended to apply to all cases pending on the date of enactment as well as all future cases. Bradley v. Richmond School Board, 416 U.S. 696 (1974)." (H.R. Rep., No. 94-1558, 94th Cong., 2d Sess. 4 n.6 (1976) (hereafter "H.R. Rep.")).

This same point was made

without objection in both the House ^{4/} and Senate ^{5/} debates. Moreover, on the floor of the House a motion to recommit the bill was offered by Congressman Ashbrook for the purpose of obtaining an amendment to make the Act prospective only. That motion was defeated by a vote of 268 - 104. See 122 CONG.REC. H12166 (Oct. 1, 1976).

Petitioners argue that the application of the Act to cases pending on appeal works a "manifest injustice" under Bradley v. Richmond School Board, 416 U.S. 696 (1974). Bradley, of course, held legislation authorizing attorneys' fees in Title VI cases to be retroactive, and found no "manifest injustice" in doing so. Bradley did not suggest that a court's perception of unfairness might override an express legislative direction; rather, the rule it articulated was intended to govern where, as in that case, the legislative will on the question of retroactivity was uncertain. See id., at 716 and n.23. Here, as already shown, Congress expressed with unmistakable clarity its intent that the Act apply retroactively to pending cases. Moreover, this case involves anything but "manifest

^{4/} See 122 CONG.REC. H12155 (Cong. Anderson); id., at H12160 (Cong. Drinan).

^{5/} 122 CONG.REC. S17052 (Sen. Abourezk).

injustice." At the very outset, The complaint filed in this case sought attorneys' fees. See I C.T. 13. For nearly the entire time it was pending in the District Court, the rule prevailing in the Northern District of California allowed for an award of attorneys' fees on the "private attorney general" theory. See, e.g., La Raza Unida v. Volpe, 57 F.R.D. 94 (N.D. Calif. 1972). While the matter was still before the District Court, the Court of Appeals for the Ninth Circuit approved the rule of the La Raza case and held that attorneys' fees could be awarded in Civil Rights Act suits. Brandenburger v. Thompson, 494 F.2d 885 (9th Cir. 1974). While this case was pending on appeal, Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975) disapproved the rule of those cases, and subsequently Congress acted to reinstate the law as it existed at the time the District Court ruled. Petitioners' expectations can, therefore, hardly be said to have been frustrated by the passage of the Act. 6/

6/ Petitioners' complaint that a "sanction" has been imposed upon them "for performing duties legal at the time" (Zurcher Pet., at 13; see also Bergna Pet. at 22) is without basis in fact. While it is true that at the time of the

Petitioners also view the fee award as a "manifest injustice" because

6/ continued.

search, the entitlement of a prevailing plaintiff in a Civil Rights Act suit to an award of fees was uncertain, no part of the award is either punishment or compensation for the actions of Petitioners on the date of the search. Rather, the fee award stems from the subsequent decision of Petitioners--essentially a continuing one--to contest this suit and to insist, as Petitioners Bergna, et al., did in their pleadings, that should the occasion be presented in the future they would again conduct a search of the type which prompted this action. I C.T. 27.

This distinction--between penalties or damages for primary conduct, on the one hand, and an award of fees incurred in litigation to determine the legality of that conduct, on the other--is a significant one which Petitioners overlook. It is for that reason that the Act expressly provides that the fee award will be treated "as part of the costs." See S. Rep. No. 94-1011, 94th Cong., 2d Sess. 5 & n.6 (1976) (hereafter

it imposes a financial exposure upon "individuals and . . . not publicly funded governmental entities" Zurcher Pet., at 13. Were that statement true, their quarrel, of course, would lie with Congress. But the specter of modestly paid governmental employees being compelled to bear the fee award in this case is altogether false. Petitioners have omitted to disclose to this Court that, as the District Court found (see Pet. App., at 52), under California law both the costs of defense and any award must be paid by the public entity which employed the public employees against whom the award is made where, as in this case, they were acting within the scope of their employment. Calif. Govt. Code §825. 7/ Thus the City of

6/ continued.

"S. Rep."); see also Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) (Stevens, J., concurring) (fees are costs and thus not within Eleventh Amendment bar to damage recovery from a State).

7/ That the District Court was correct in finding that the California indemnity statute is applicable to Civil Rights Act suits so that "the public, and not the individual officer, will bear the responsibility for litigation

Palo Alto and the County of Santa Clara -- not Petitioners -- will ultimately bear these costs.

For these reasons, the question of the Act's applicability to the present case presents no important issue of federal law. Nor is the judgment in conflict with decisions of other courts, for the opinions of the lower courts are unanimous in finding that Congress intended the Act to apply to all pending cases. See, e.g., Bond

7/ continued.

and pay any judgment for attorney's fees" (Pet. App., at 53) is now settled; last year the California Supreme Court expressly held the indemnification provisions applicable to Section 1983 actions against police officers, relying upon and citing with approval the District Court's analysis in the Stanford Daily case. Williams v. Horvath, 16 Cal.3d 834, 846-47 (1976).

Even without an express indemnification statute, the federal court has the power under the Act to direct that the fee award be paid from public funds. See note 15, infra; Finney v. Hutto, 548 F.2d 740 (8th Cir. 1977).

v. Stanton, 555 F.2d. 172 (7th Cir. 1977); Finney v. Hutto, 548 F.2d 740 (8th Cir. 1977); Rainey v. Jackson State College, 551 F.2d 672 (5th Cir. 1977); Martinez Rodriguez v. Jiminez, 551 F.2d 877 (1st Cir. 1977); Wade v. Mississippi Co-Op Extension Service, 424 F.Supp. 1242 (N.D. Miss. 1976); Gary W. v. State of Louisiana, 429 F.Supp. 711 (E.D. La. 1977).

B. The Act Does Not Apply Common Law Immunities to Fee Awards and Does Not Require a Showing of "Bad Faith" As a Condition of Awarding Fees.

Petitioners Bergna, et al., argue that the absolute immunity of prosecutors from money damages (Imbler v. Pachtman, 424 U.S. 409 (1976)) likewise bars an award of attorneys' fees. ^{8/} (Bergna Pet., at 20). Although the point they make is not entirely clear, Petitioners Zurcher, et

^{8/} Petitioners Bergna, et al., make the same point regarding the absolute immunity from damages afforded to judges under Pierson v. Ray, 386 U.S. 547 (1967). Bergna Pet., at 19-20. No such question is presented here, for the judge who issued the warrant was dismissed as a party to this litigation. II C.T. 386.

al., appear to contend that police officers cannot be liable for fees absent a determination that they acted in bad faith. See Zurcher Pet., at 9-11. Although Petitioners do not say so, they presumably mean to assert that the qualified immunity from damages for reasonable acts taken in good faith (see, e.g., Pierson v. Ray, 386 U.S. 547, 555-58 (1967)) extends to awards of attorneys' fees. In short, Petitioners apparently contend that in passing the Civil Rights Attorneys' Fees Awards Act of 1976, Congress silently intended to preserve all immunities applicable to money damages, thereby altogether exempting those, such as judges and prosecutors, with absolute immunity and limiting the availability of fee awards as to others, such as police officers (Pierson v. Ray, *supra*), school officials (Wood v. Strickland, 420 U.S. 308 (1975)), and executive officers (Scheuer v. Rhodes, 416 U.S. 232 (1974)), to cases in which the defendants have acted in bad faith.

Petitioners seek an interpretation of the Act which would quite literally render this legislation meaningless, for even without specific legislation the courts had uniformly asserted the power to award attorneys' fees in "bad faith" cases. Petitioners' reading of the Act is therefore completely illogical. It is, moreover, wholly inconsistent with the unambiguous legislative history of this carefully scrutinized and fully debated

legislation. It is likewise at odds with lower court authority in attorneys' fee cases decided both prior and subsequent to the enactment of the Civil Rights Attorneys' Fees Awards Act of 1976.

1. The question of whether attorneys' fees may be awarded to the prevailing plaintiff in a Civil Rights Act suit against a defendant who is absolutely immune from liability for money damages or, as to others, without a finding of "bad faith" is solely one of legislative intention. 9/ None of

9/ It is plain that the Eleventh Amendment poses no barrier to this award of attorneys' fees. In the first place, its immunity extends only to actions against a State and not to suits against municipalities or counties. See, e.g., Lincoln County v. Luning, 133 U.S. 529 (1890); Edelman v. Jordan, 415 U.S. 651, 667 n.12 (1974); Incarcerated Men of Allen County Jail v. Fair, 507 F.2d 281, 287 (6th Cir. 1974). In this case, the defendants were all employees of either the County of Santa Clara or the City of Palo Alto. Moreover, this Court held in Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) that actions brought under civil rights laws enacted

this Court's decisions finding either an absolute or qualified immunity against

9/ continued.

pursuant to the Congressional authority conferred by Section 5 of the Fourteenth Amendment may be maintained "which are constitutionally impermissible in other contexts." Id. The Court specifically held that, in such circumstances, the Eleventh Amendment does not preclude an award for attorneys' fees. The Civil Rights Attorneys' Fees Award Act of 1976 was unquestionably founded upon Section 5 of the Fourteenth Amendment. See, e.g., S. Rep., at 5; H.R. Rep., at 7 n.14. Every court which has considered the issue has held that the Eleventh Amendment does not bar fee awards authorized by the Act. E.g., Bond v. Stanton, 555 F.2d 172 (7th Cir. 1977); Finney v. Hutto, 548 F.2d 740 (8th Cir. 1977); Rainey v. Jackson State College, 551 F.2d 672 (5th Cir. 1977); Martinez Rodriguez v. Jiminez, 551 F.2d 877 (1st Cir. 1977); Wade v. Mississippi Co-op Extension Service, 424 F.Supp. 1242 (N.D. Miss. 1976); Gary W. v. State of Louisiana, 429 F.Supp. 711 (E.D. La. 1977).

money damages has ever held that such immunity was constitutionally compelled or that Congress was without power to legislate a broader exposure. See Tenney v. Brandhove, 341 U.S. 367, 372 (1951); Pierson v. Ray, *supra*; Wood v. Strickland, *supra*; Scheuer v. Rhodes, *supra*; O'Connor v. Donaldson, 422 U.S. 563, 576-77 (1975); Imbler v. Pachtman, *supra*. Thus in Pierson v. Ray, *supra*, at 554, the Court found that "[t]he legislative record gives no clear indication that Congress meant to abolish wholesale all common-law immunities." As the Court recently said, "Tenney [v. Brandhove, *supra*] squarely presented the issue of whether the Reconstruction Congress had intended to restrict the availability in §1983 suits of those immunities which historically, and for reasons of public policy, had been accorded to various categories of officials." Imbler v. Pachtman, *supra*, at 417-18. Yet Petitioners advance their theories of immunity without grappling with the legislative history of the Act or otherwise attempting to address the controlling question of Congress' intent.

2. If the Act was intended by Congress to exempt those with absolute immunity from money damages, and to permit the award of attorneys' fees only in cases involving "bad faith" so that a qualified immunity against money damages might also be overcome, it went to a good deal of trouble for nothing. The Act was responsive to this Court's

decision in Alyeska, in which this Court acknowledged that, even in the absence of legislative direction,

"a court may assess attorneys' fees . . . where the losing party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons'" [citations] These exceptions are unquestionably assertions of inherent power in the courts to allow attorneys' fees in particular situations, unless forbidden by Congress." (421 U.S. at 258-59).

See also Hall v. Cole, 412 U.S. 1, 5 (1973); Sims v. Amos, 340 F.Supp. 691, 694 (M.D. Ala.), *aff'd*, 409 U.S. 942 (1972) (per curiam); 6 MOORE'S FEDERAL PRACTICE ¶54.77[2]. Petitioners' interpretation of the Act treats it as no more than a codification of the status quo. That view could be sustained only by ignoring both the obvious legislative purpose and what the Court of Appeals called the Act's "crystalline" (Pet. App., at 5) legislative history.

3. Not a word of the extensive legislative history of the Act supports the Petitioners' construction of the Act, which perhaps explains their disinclination to address it. To the

contrary, the record documents Congress' intention to go well beyond the "bad faith" exception acknowledged in Alyeska,^{10/} and to authorize the award of fees to prevailing plaintiffs in the usual -- not the exceptional -- case. Thus the Senate Judiciary Committee said:

"It is intended that the standards for awarding fees be generally the same as under the fee provisions of the 1964 Civil Rights Act. A party seeking to exercise the rights protected by [the Act], if successful, 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.' Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968)." (S. Rep., at 4.)

The legislative intent that fees be awarded as to defendants who

^{10/} Congress was, of course, well aware that fees could, under Alyeska, be awarded in "bad faith" cases. See, e.g., S. Rep., at 5 n.7; H.R. Rep., at 2 n.1.

might be immune from an award of money damages and even though "bad faith" had not been shown was explicitly stated in the House Judiciary Committee's Report:

"[W]hile damages are theoretically available [in Civil Rights Act cases], it should be observed that, in some cases, immunity doctrines and special defenses, available only to public officials, preclude or severely limit the damage remedy. [Citing Wood, Scheuer, and Pierson]. Consequently, awarding counsel fees to prevailing plaintiffs in such litigation is particularly important and necessary if Federal civil and constitutional rights are to be adequately protected. To be sure, in a large number of cases brought under the provisions covered by H.R. 15460, only injunctive relief is sought, and prevailing plaintiffs should ordinarily recover their counsel fees." (H. Rep. at 9).

And on the floor of the Senate, Senator Abourezk stated that one of the Act's

purposes was to eliminate the necessity, created by Alyeska, of adjudicating the good faith of the defendants:

"[The Act] will also result in a significant saving of judicial resources. At present, due to the Alyeska decision, a court must analyze a party's actions to determine bad faith in order to award attorneys' fees. This is a complex, time-consuming process often requiring an extensive evidentiary hearing. The enactment of this legislation will make such an evidentiary hearing unnecessary in the many civil rights cases presently pending in the Federal courts." (122 CONG.REC. S17052).

That Congress deliberately meant to authorize the award of fees in cases of this type could hardly be made plainer than by the Judiciary Committee's explicit reference with approval to decisions -- including this very case -- awarding fees without regard to the good or bad faith of the defendant:

"It is intended that the amount of fees awarded under S. 2278 be

governed by the same standards which prevail in other types of equally complex Federal litigation, such as anti-trust cases and not be reduced because the rights involved may be nonpecuniary in nature. The appropriate standards, see Johnson v. Georgia Highway Express, 488 F.2d 714 (5th Cir. 1974), are correctly applied in such cases as Stanford Daily v. Zurcher, 64 F.R.D. 680 (N.D. Cal. 1974); Davis v. County of Los Angeles, 8 E.P.D. ¶9444 (C.D. Cal. 1974); and Swann v. Charlott-Mecklenburg Board of Education, 66 F.R.D. 483 (W.D.N.C. 1975). These cases have resulted in fees which are adequate to attract competent counsel, but which do not produce windfalls to attorneys. In computing the fee, counsel for prevailing parties should be paid, as is traditional with attorneys compensated by a fee-paying client, 'for all time reasonably expended on a matter.'

Davis, supra; Stanford Daily, supra, at 684."
(S. Rep., at 6).

4. As the foregoing quotation from the Senate Judiciary Committee Report indicates, Congress intended the Act to restore the pre-Alyeska rules and standards for awarding fees in Civil Rights Act cases which had evolved in the lower courts.^{11/} The prior law, which forms the background against which Congress acted, provides no support for the notion that immunity from damages extends to an award of attorney's fees.

It has long been the rule that public entities or employees may be taxed costs even though liability

^{11/} Thus the Senate Judiciary Committee Report added: "This bill creates no startling new remedy-- it only meets the technical requirements that the Supreme Court has laid down if the Federal courts are to continue the practice of awarding attorneys' fees which had been going on for years prior to the Court's [Alyeska] decision." Id., at 6; see also H.R. Rep., at 6-9.

for damages may be barred.^{12/} Congress was aware of that rule (see S. Rep., at 5) and reflected its intent that the statutory immunity from damages not also bar a fee award by providing in the Act that fees be treated "as part of the costs."

Further, Congress was of course aware that, prior to Alyeska, those courts which had awarded attorney's fees under the "private attorney general" rationale had done so without pausing to inquire whether the

^{12/} See, e.g., Fairmont Creamery Co. v. State of Minnesota, 275 U.S. 70 (1927); Sims v. Amos, 340 F.Supp. 691 (M.D. Ala.), aff'd., 409 U.S. 942 (1972) (per curiam); Boston Chapter N.A.A.C.P., Inc. v. Beecher, 504 F.2d 1017, 1028-29 (1st Cir. 1974), cert. denied sub nom. Director of Civil Service v. Boston Chapter N.A.A.C.P., Inc., 421 U.S. 910 (1975); Class v. Norton, 505 F.2d 123, 126 (2d Cir. 1974); Samuel v. University of Pittsburgh, 538 F.2d 991, 999 (3d Cir. 1976); Gates v. Collier, 70 F.R.D. 341, 347-48 (N.D. Miss. 1976); Welsch v. Likins, 68 F.R.D. 589, 594-95 (D. Minn. 1975), aff'd., 525 F.2d 987 (8th Cir. 1975) (per curiam).

defendants had acted in "bad faith".^{13/} Indeed, Bradley v. Richmond School Board, *supra*, itself refutes Petitioners' theory. In Bradley, the District Court had awarded attorney's fees on, *inter alia*, the ground of the school board's bad faith. See

^{13/} See, e.g., Brandenberger v. Thompson, 494 F.2d 885, 888 (9th Cir. 1974); Souza v. Travisono, 512 F.2d 1137, 1138-39 (1st Cir. 1975), vacated and remanded for further consideration in light of Ayleska, 423 U.S. 809 (1976). Indeed, of the thirteen decisions cited by this Court in Ayleska as exemplars of those cases in which the "private attorney general" rationale had been applied (see 421 U.S., at 270 n.46), in all but three the question of the defendant's bad faith was treated as irrelevant to the question of awarding fees, and in the other three cases, Fairley v. Patterson, 493 F.2d 598, 606 (5th Cir. 1974); Lee v. Southern Home Sites Corp., 444 F.2d 143, 144 (5th Cir. 1971); Cornist v. Richland Parish School Board, 495 F.2d 189, 192 (5th Cir. 1974), the bad faith of the defendants was viewed as a possible alternative basis of the fee award.

53 F.R.D. 28, 39-40 (E.D. Va. 1971). The Court of Appeals reversed, finding that the board had not acted in bad faith or been "unreasonably obdurate." See 472 F.2d 318, 320-27 (4th Cir. 1972). This Court reversed the Court of Appeals, reinstating the District Court's fee award, on the basis of the recently enacted legislation authorizing fee awards in Title VI cases. In so doing, however, the Court did not discuss the "bad faith" issue, let alone disapprove the Court of Appeals' determination that the school board had not been in bad faith; it simply found that Congress had authorized fee awards, and that such authority applied to pending cases.^{14/} Thus a finding of bad faith was not found by this Court to be a necessary condition for the award of attorneys' fees.

5. Petitioners cite no decision of any court in support of their interpretation of the Act. We know of none. The new Act has been uniformly applied to authorize fees against defendants sued in their official capacity without regard to their good faith or bad faith. See, e.g., Finney v. Hutto, 548 F.2d 740 (8th Cir.

^{14/} The defendants in Bradley had, of course, an immunity against money damages absent a finding of bad faith. See Wood v. Strickland, *supra*.

1977); Martinez Rodriguez v. Jiminez, 551 F.2d 877 (1st Cir. 1977) (explicitly holding that claim of bad faith need not be considered in order to award fees); Rainey v. Jackson State College, 551 F.2d 672 (5th Cir. 1977); Bond v. Stanton, 555 F.2d 172 (7th Cir. 1977). Wade Mississippi Co-op Extension Service, 424 F.Supp. 1242 (N.D. Miss. 1976);^{15/} McCormick v.

^{15/} In Wade, the District Court expressly found that certain individual defendants had not been in bad faith. It held that they could be liable for fees in their official capacities but in light of their good faith could not be liable for fees in their individual capacities. As the District Court understood the effect of that distinction, the fees would be payable out of public funds but not out of the defendants' own resources. This distinction is not significant for purposes of the present case because the defendants were all sued in their official capacity and, under California law (see p. 20, supra), the fee award will be paid by public entities.

For this reason, the present case presents no occasion to consider whether, absent a finding of bad faith, a fee award might be

Attala City Board of Education, 424 F.Supp. 1382 (N.D. Miss. 1976); Gary W. v. State of Louisiana, 429 F.Supp. 711 (E.D. La 1977); Wilson v. Chancellor, 425 F.Supp. 1227 (D. Ore. 1977); Georgia Association of Educators v. Nix, ___ F.Supp. ___ No. C-74-1870 A,

^{15/} continued.

directed at a public employee in his individual capacity so that the ultimate economic burden of that award would rest on the employee and not on the public entity which employed him. The Senate Judiciary Committee Report may imply a negative answer, for it states that "it is intended that the attorneys' fees . . . will be collected either directly from the official, in his official capacity, or from the public entity." Id., at 5 n.7. Even prior to the passage of the Act, some courts had drawn this distinction, allowing the fees to be payable by the public entity but not by the employee, at least in the absence of proof of the employee's bad faith. See, e.g., Class v. Norton, 505 F.2d 123, 126-28 (2d Cir. 1974); Incarcerated Men of Allen County Jail v. Fair, 507 F.2d 281, 286 (6th Cir. 1974); compare Thonen v. Jenkins,

decided Jan. 26, 1977 (N.D. Ga.);
Commonwealth of Pennsylvania v.
O'Neill, 431 F.Supp. 700 (E.D. Pa.

15/ continued.

517 F.2d 3 (4th Cir. 1975); (fee award against employee in individual capacity proper where finding of "obdurate obstinacy"). The issue of whether an employee who acted in good faith may be liable for fees may, as a practical matter, be academic if, as the Court of Appeals held in Finney v. Hutto, supra, fees can be awarded against a public entity not specifically named as a party where its employee is sued in his official capacity. This procedure solves the "problem" by which Petitioners purport to be troubled--namely, that municipal entities are not "persons" which may be sued under 42 U.S.C. §1983. Bergna Pet., at 20 n.12.

1977). No decision has been reported which supports Petitioner's interpretation of the Act.

CONCLUSION

The petition for certiorari should be denied.

DATED: July 26, 1977.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1484

JAMES ZURCHER, et al.,
Petitioners,

VS.

THE STANFORD DAILY, et al.,
Respondents.

No. 76-1600

LOUIS P. BERGNA, District Attorney, et al.,
Petitioners,

VS.

THE STANFORD DAILY, et al.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals
for the Ninth Circuit

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1484

JAMES ZURCHER, Individually and as Chief of Police of
the City of Palo Alto, County of Santa Clara, State
of California, JIMMIE BONANDER, PAUL DEISINGER,
DONALD MARTIN and RICHARD PEARDON, all
Individually and as Police Officers of the
City of Palo Alto, County of Santa
Clara, State of California,
Petitioners,

vs.

THE STANFORD DAILY, FELICITY A. BARRINGER, FRED MANN,
EDWARD H. KOHN, RICHARD LEE GEEATHOUSE,
ROBERT LITTERMAN, HALL DAILY
and STEVEN G. UNGAR,
Respondents.

No. 76-1600

LOUIS P. BERGNA, District Attorney, Santa Clara
County, California, and CRAIG BROWN,
Deputy District Attorney,
Petitioners,

vs.

THE STANFORD DAILY, et al.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals
for the Ninth Circuit

BRIEF FOR PETITIONERS ZURCHER, BONANDER, DEISINGER,
MARTIN AND PEARDON

OPINION BELOW

The opinion of the Court of Appeals reported at 550 F.2d 464, appears as Appendix A to the petitions for writ of certiorari; an opinion of the District Court adopted by the Court of Appeals and reported at 353 F.Supp. 125 appears as Appendix C to the petitions.¹

JURISDICTION

The Court of Appeals' order denying the petitions for rehearing and rejecting the suggestions for rehearing in banc, appearing as Appendix B to the petitions for writ of certiorari, was filed on March 28, 1977. The petitions for writ of certiorari were timely filed, docketed in this Court on April 26 and May 16, 1977 and granted on October 3, 1977. 28 U.S.C.A. § 2101(c) (1959). The jurisdiction of this Court is conferred by Title 28, United States Code section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Civil Rights Act of 1871, 42 U.S.C., section 1983, provides in pertinent part as follows:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen . . . to the deprivation of any rights,

¹Two other opinions of the District Court not adopted by the Court of Appeals and reported at 366 F.Supp. 18 and 64 F.R.D. 680 appear as Appendices D and E to the petitions for writ of certiorari.

privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

2. The Fourth Amendment to the Constitution of the United States provides as follows:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

3. Section 1524 of the Penal Code of the State of California provides in pertinent part as follows:

"A search warrant may be issued upon any of the following grounds:

4. When the property or things to be seized consist of any item or constitute any evidence which tends to show a felony has been committed, or tends to show that a particular person has committed a felony.

The property or things described in this section may be taken on the warrant from any place, or from any person in whose possession it may be."

4. Section 1528 of the Penal Code of the State of California provides as follows:

"If the magistrate is thereupon satisfied of the existence of the grounds of the application, or that there is probable cause to believe their existence, he must issue a search warrant, signed

by him with his name of office, to a peace officer in his county, commanding him forthwith to search the person or place named, for the property or things specified, and to retain such property or things in his custody subject to order of the court as provided by Section 1536."

5. The First Amendment to the Constitution of the United States provides in pertinent part as follows:

"Congress shall make no law . . . abridging the freedom of speech, or of the press . . ."

6. Public Law No. 94-559, 90 Stat. 2640 (October 19, 1976), provides in pertinent part as follows:

"In any action or proceeding to enforce a provision of sections . . . 1979 [42 USC Sec. 1983] . . . of the Revised Statutes, . . . the Court, in its discretion, may allow the prevailing party other than the United States, a reasonable attorneys' fee as part of the costs."

QUESTIONS PRESENTED

1. Did the Ninth Circuit Court of Appeals err in holding that a search violated the Fourth Amendment solely because the affidavit in support of the warrant did not establish probable cause to believe that a subpoena duces tecum would be impractical?

2. Where a warrant is fair on its face and the affidavit is sufficient under current statutory and case law:

(a) Are the police officers who serve the warrant liable under Section 1983 where additional facts were not set forth in the affidavit?

(b) Is the Chief of Police, who neither knew the warrant was being sought nor participated in its execution, liable on a respondeat superior theory?

3. Was it the intent of Congress that the Civil Rights Attorneys' Fees Awards Act of 1976 be applied retroactively to services rendered prior to its effective date? If so, would it be manifestly unjust to so apply the Act to these petitioners?

STATEMENT OF THE CASE

On May 13, 1971, the Stanford Daily of Stanford, California, a student newspaper, and seven alleged members of the Daily's staff filed a complaint in the United States District Court for the Northern District of California. (App. 15-35.) The complaint, pursuant to Title 42, United States Code section 1983, sought declaratory relief, a permanent injunction, and attorneys' fees. (App. 30-31.) As defendants, the complaint named J. Barton Phelps, Judge of the Municipal Court for the Palo Alto-Mountain View Judicial District; Louis P. Bergna, District Attorney of Santa Clara County; Craig Brown, a deputy district attorney; James Zurcher, Chief of Police for the City of Palo Alto; and Palo Alto Police Officers Jimmie Bonander, Paul Deisinger, Donald Martin, and Richard Peardon. (App. 15-17.)

On October 5, 1972, without permitting depositions previously noticed by defendants,² the district court issued its memorandum and order granting summary judgment to plaintiffs. Declaratory relief only was granted, the Court stating its anticipation "that [the] decision [would] be honored and that an injunction [would be] unnecessary." (Petition, App. C, 36.)

At plaintiffs' request, the action against Judge Phelps was dismissed on December 15, 1972. (App. 190.)

By memorandum and order of August 10, 1973 (Petition, App. D), the district court granted attorneys' fees, and by memorandum and order of July 19, 1973 (Petition, App. E), these fees were fixed at \$47,500. Judgment was entered July 23, 1974 (Petition, App. F) and notice of appeal was filed August 21, 1974 (App. 9).

The Court of Appeals filed its opinion on February 2, 1977 (Petition, App. A) adopting the district court's opinion of October 5, 1972 (Petition, App. C), and sustaining the attorneys' fees award but on a different ground than that relied on by the district

²On October 8, 1971, defendants noticed the taking of depositions of the plaintiffs (App. 3), but cancelled the depositions at the request of the district court to attempt a stipulation of fact (CT I, 135; CT II, 324-329, CT III, 799).

When it became apparent no such stipulation could be finalized without depositions, defendants noticed plaintiffs' depositions for a second time on June 12, 1972. (App. 3.) Plaintiffs responded with both a motion for a protective order and a motion for summary judgment (App. 4), which were heard on July 10, 1972 (App. 5). The motion for summary judgment was granted, foreclosing discovery on the merits of the case, including defendant's unanswered requests for admissions (CT I, 247-251).

court. Petitions for rehearing and suggestions for rehearing in banc were denied and rejected on March 28, 1977. (Petition, App. B.) The mandate of the Court of Appeals has been stayed pending consideration by this Court. (App. 14.)

STATEMENT OF FACTS

On Friday, April 9, 1971, members of the Palo Alto Police Department and the Sheriff's Department of Santa Clara County were called to the Stanford University Hospital to remove a large group of demonstrators. (App. 170-171, 176-177, 180-181.) After several unsuccessful attempts to persuade the demonstrators to leave peacefully, the officers forced their way through the demonstrators' barricade and into the offices of the hospital. (App. 170-183.) While the main police advance was proceeding on the west side of the building, unknown persons armed with chair legs and other weapons attacked nine officers stationed on the east side. (App. 34, 104, 174-175.) One of the nine officers was knocked to the floor and struck repeatedly on the head. (App. 174.) The Daily reported that "several policemen were beaten to the ground by demonstrators armed with clubs", one officer suffering an apparent broken shoulder. (App. 104; see App. 179.) All nine officers were injured. (App. 104, 179; see, Petition, App. C, 11.)

No police photographer was located at the east end of the hospital and most news photographers were located at the west end, the site of the main resistance.

(App. 152-153.) But Officer Peardon, who was one of the assault victims, did see at least one photographer taking photographs of the assaults from a position "directly behind the Palo Alto officers"; and, on Sunday, April 11, photographs appearing in a special edition of the Stanford Daily indicated that the Daily's photographer had been in a position where he could have photographed the assaults. (App. 34-35.)

Officer Peardon obtained a copy of the special edition and on Monday, April 12, with the assistance of Deputy District Attorney Brown, prepared a search warrant affidavit.³ (App. 27, 33-35, 37, 152-154.) The affidavit described the assaults, stated that Peardon had seen a person photographing the assaults and described the photographs published in the Daily's special edition. (App. 33-35.)

Though not mentioned in the search warrant affidavit, Brown had specific reasons, later disclosed in an affidavit opposing summary judgment, for recommending a search warrant rather than a subpoena duces tecum. (App. 149-154.) First, almost all felony prosecutions in California are necessarily prosecuted by the complaint-information procedure, and under that procedure, no subpoena may issue until a defendant has been identified and a prosecution initiated. (App. 153-154.) Second, in a 1969 proceeding that arose out of another demonstration, Brown had sought to obtain

³As an eyewitness, Officer Peardon had the requisite personal knowledge to establish traditional probable cause for the warrant. It was not suggested below that he was the appropriate person to further establish the impracticality of a subpoena, nor that he was in charge of the investigation.

photographic evidence from the Daily by means of a subpoena duces tecum. (App. 149.) Two staff members had given testimony to the effect that evidence sought by the subpoena had been either misplaced or stolen. (App. 149-151.) Brown had then examined "contact sheets" produced by the Daily and concluded "that the contact sheets and/or films from which they had been produced were incomplete and that a number of photographs, in [Brown's] opinion those which would have been incriminating, had been deleted." (App. 150.) Third, in policy statements published prior to April, 1971, the Daily stated that it felt "no obligation to help in the prosecution of students for crime related to political activity" and that "negatives which [could] be used to convict protestors [would] be destroyed." (App. 118, 152-153.) For these reasons, Brown was of the opinion that speedy action was required to avoid destruction of crucial evidence and that such action could only be accomplished by means of a search warrant. (App. 152-154.)

⁴Between the time of the 1969 proceeding and the time of the events that are the basis of this case there were numerous civil disorders in Palo Alto and on the Stanford campus. (App. 152.) But photographic evidence of crimes committed during these disorders had usually been available, without court order, from police photographers or news media other than the Daily. (App. 152.)

⁵An affidavit of a staff member filed in support of plaintiffs' motion for summary judgment asserted that the Daily's policy of evidence destruction did not apply to material covered by a subpoena; this qualification of the policy had not been contained anywhere in the published statement. (App. 84, 117-118.)

⁶The police victims were generally not able to identify the persons who assaulted them. (App. 175, 180.)

When Peardon's affidavit was prepared, it was taken before Judge Phelps. (App. 21-22.) Judge Phelps issued a warrant commanding any peace officer in the county to search the premises of the Daily for photographs of the April 9 demonstration, negatives of the photographs and any film used in taking the photographs. (App. 21-22.) The defendant officers executed the warrant at approximately 5:50 in the afternoon, searching desk tops, table tops, unlocked drawers,⁷ and other relatively open areas, glancing at materials to determine whether there were pictures, films or negatives concealed among them, but not reading in whole or in part any written material. (App. 155-169.) Materials were, as much as possible, returned to the position in which they were found. (App. 158, 165, 169.) Staff members observing the search did not make any claim of confidentiality for any material.⁸ (App. 158, 161, 165, 168-169.) The entire search lasted about fifteen minutes.⁹ (App. 158, 162, 165, 169.) Of the materials described in the warrant, only the published photo-

⁷There were several locked drawers in the Daily's desks and filing cabinets; these were not opened. (App. 157, 161, 164, 168.)

⁸During the search, each police officer was closely watched by many persons who apparently were Stanford Daily staff members, photographed numerous times, and subjected to harassing comments. (App. 157-158, 161, 165, 168.)

⁹Whether any material was read was disputed but as the district court's ruling was made on plaintiffs' motion for summary judgment, the factual dispute should have been resolved in defendants' favor. See 6 MOORE'S FEDERAL PRACTICE, ¶56.27[1] (2d ed. 1974.) There is some indication in the district court's opinion that it erroneously resolved the issue in favor of plaintiffs. See Petition, App. C, 31-32.

graphs were found; nothing was seized. (App. 27, 43, 53; Petition, App. C, 13.)

SUMMARY OF ARGUMENT

1. The Ninth Circuit, by adopting the opinion of the district court, held that "third parties" inherently are entitled to greater Fourth Amendment protection than persons who have fallen under suspicion of criminal misconduct. Therefore, a search of the premises of a third party is "unreasonable per se", even pursuant to warrant, "unless the Magistrate has before him a sworn affidavit establishing . . . that the materials in question will be destroyed, or that a subpoena duces tecum is otherwise 'impractical'." (Petition, App. C, 14.)

A. The district court was in error in assuming that a subpoena duces tecum can be used to achieve the same end as a warrant. First, the processes are functionally dissimilar under California law. A search warrant is needed in the initial investigatory stage to gather the evidence upon which any arrest or charge is based. A subpoena is limited to subsequent stages to procure the production of witnesses and admissible evidence at formal hearings. Second, the practicality of a subpoena cannot be tested without actually issuing it, thus losing the element of secrecy necessary in many cases to preserve the evidence and risking the dissipation of the factual bases for traditional elements of probable cause. Third, resort to a grand

jury subpoena in this case, as the district court suggested on its own, was neither shown to be factually feasible nor proven to be legally valid to implement a police investigation rather than a grand jury case. Furthermore, under California law, it would be difficult, as a practical matter, and undesirable, as a policy matter, to transfer a police investigation to a grand jury for the sole purpose of obtaining a subpoena in lieu of a search warrant.

B. The district court established neither the accuracy nor the relevance of its second assertion; *i.e.*, that 18th century search warrants were directed only to suspects. Third-party searches are prevalent today, in any case.

C. The district court erred in its third assumption that a third-party receives no meaningful protection since the exclusionary rule is not available. First, the many remedies provided under California and federal law are meaningful, particularly if the victim is a true third party since the stigma of criminal involvement does not attach. Second, California has provided a vicarious exclusionary rule allowing for suppression of evidence taken in a third party search. No additional protections were required because the third party was a student newspaper: The nonconfidential photographs were particularly described; the search was brief and narrow; and the searchers were closely observed to prevent any deviation from the confines of the warrant.

D. The district court misplaced reliance upon a Federal Rules case involving the detention of a mate-

rial witness. Not only is there no precedent for the district court's rule, but the rule conflicts with settled law as to the scope of probable cause needed for a search warrant and has been rejected by state and federal courts.

2. The ruling that the police officers and Chief of Police were proper parties flies in the face of section 1983's tort background, which requires culpable fault and participation in that fault in order to state a claim and confer jurisdiction. The police officers, pursuant to judicial command, properly executed the warrant which fully comported with all of the then enunciated law concerning search warrants. Such officers were not acting independently but were acting as an arm of the court, and should be protected by both judicial immunity and the defense of good faith.

The police chief was not a proper party. He had no prior knowledge of the search and did not participate in it; furthermore, the doctrine of respondeat superior is inapplicable.

3. The legislative history of the Civil Rights Attorneys' Fees Awards Act of 1976 does not clearly indicate a congressional intent that attorneys' fees should be awarded for services rendered years before its enactment. A retroactive application of the Act will not serve to promote its purpose to encourage challenges of civil rights deprivations. Rather, it would only serve to penalize these policemen who acted at all times in good faith. Also, retroactive application of the Act would result in manifest injustice since the police officers would be responsible for fees

stemming from actions which were perfectly legal at the time.

ARGUMENT

I

THE TRADITIONAL REQUIREMENTS THAT SEARCH WARRANTS ISSUE ON PROBABLE CAUSE TO BELIEVE SEIZABLE ITEMS ARE IN A PARTICULAR PLACE SHOULD NOT BE ENCUMBERED BY ADDITIONAL REQUIREMENTS

The Ninth Circuit adopted the opinion of the district court (Petition, App. A, 2) as to the validity of the search. The district court had framed the search warrant issue as follows:

[A]re law enforcement agencies required to explore the subpoena duces tecum alternative before obtaining a search warrant against third parties for materials in their possession? (Petition, App. C, 14.)

The district court held affirmatively:

For the reasons set forth below the Court holds that third parties are entitled to greater protection, particularly when First Amendment interests are involved. It is the Court's belief that unless the Magistrate has before him a sworn affidavit establishing proper cause to believe that the materials in question will be destroyed, or that a subpoena duces tecum is otherwise "impractical", a search is unreasonable per se and therefore violative of the Fourth Amendment. (Petition, App. C, 14.)

Upon analysis of these reasons, the fabric of the district court's opinion disintegrates.

A. A subpoena duces tecum is not a meaningful alternative to a search warrant.

The district court's first reason was made without citation of legal authority or evidence in the record:

The intrusion from the execution of a warrant . . . is simply "unnecessary" in most situations involving non-suspects, since a "less drastic means" [a subpoena duces tecum] exists to achieve the same end. (Petition, App. C, 22.)

The proposition that a subpoena can substitute for a warrant is open to serious doubt.

(1) The processes are functionally dissimilar.

A search warrant, unlike a subpoena, is an investigatory tool utilized at the initial state of a criminal proceeding to gather the evidence upon which subsequent steps depend.¹⁰⁴ It may be issued (1) when the property was stolen or embezzled; (2) when the property or things were used as the means of committing a felony; (3) when the property or things are in the possession of any person with the intent to use it as a means of committing a public offense, or in the possession of another to whom he may have delivered it for the purpose of concealing it or preventing its being discovered; or (4) when the property or things seized consist of any item or constitute any evidence that tends to show that a felony has been

¹⁰⁴ [T]he issuance of a search warrant and the resulting search of a person and/or his premises are usually followed by an arrest and the filing of a felony charge based upon the fruits of the search. . . ." [People v. Escamilla, 65 Cal.App.3d 558, 563, 135 Cal.Rptr. 446 (1977).] See, also, THE AMERICAN LAW INSTITUTE, A MODEL CODE OF PRE-ARREST PROCEDURE 491, 509 (1975.)

committed or that a particular person has committed a felony. CAL. PEN. CODE § 1524 (West 1970). The property or things may be taken on the warrant from any place, or from any person in whose possession it may be. *Id.* It is not necessary that a warrant to search particular premises for particular property name a particular person (*United States v. Camarota*, 278 F. 388 (S.D. Cal. 1922)) and the property searched for need be described only with reasonable certainty (*United States v. Gaiton*, 4 F.2d 848 (S.D. Cal. 1925)).

In determining probable cause for the issuance of a search warrant, the question is limited, for practical reasons, to whether the affiant, at the time of his affidavit, had reasonable grounds for belief that the law was being, or had been, violated and the location of the property sought. *See, People v. Acosta*, 142 Cal. App.2d 59, 298 P.2d 29 (1956); *Arata v. Superior Court, In and For San Mateo County*, 153 Cal.App.2d 767, 315 P.2d 473 (1957).

By contrast, a subpoena is a process by which the attendance of a witness is required at the trial or a hearing preliminary thereto after the investigation is complete or well advanced. CAL. PEN. CODE §§ 1326, 1327 (West 1977); CAL. CODE CIV. PROC. § 1985 (West 1955). By subpoena duces tecum, the witness may be required to bring with him, in a criminal case, books, documents, and papers. CAL. PEN. CODE §§ 1327 (West 1977). These things must be under his control, and the witness must be bound by law to produce them in evidence. (54 CAL.JUR.2d, Witnesses § 10

(1960). These are irrelevant considerations in a search warrant context.

Unlike the search warrant which need not name a person and need specify the materials sought with only reasonable certainty, the application for a subpoena duces tecum before trial must be accompanied by an affidavit specifying the exact matters or things desired to be produced, setting forth in detail their materiality to the issues involved in the case, and stating that the named witness has the desired matters or things in his possession or under his control. *Id.* It is not an investigatory tool, for the supporting affidavit must clearly show prior knowledge that the books, papers, and documents contain competent and admissible evidence material to the actual issues to be tried. *Id.*

(2) The practicality of a subpoena cannot be tested beforehand.

Even if a subpoena duces tecum theoretically could substitute for a search warrant, its actual practicality cannot be adequately tested beforehand, a requisite for legitimate law enforcement objectives. The subpoena is issued in blank by the court or clerk; it also may be issued *ex parte* by the district attorney or his investigator. CAL. PEN. CODE § 1326 (West 1977). Objection is made *after* issuance to the production or introduction as evidence in the case. 54 CAL.JUR.2d, Witnesses § 12 (1960). If the subpoena is quashed or the materials otherwise not produced, more than likely it is too late for an effective search warrant.

(3) A subpoena provides an unnecessary prior warning.

A major drawback to a subpoena is the inherent early warning it gives that certain evidence is sought by the government. The warrant is issued without a prior adversary hearing or other notice specifically "to avoid giving warning to those in control of the place to be searched." AMERICAN LAW INSTITUTE, A MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE, Note § 220.1 (1975). The Supreme Court, speaking in the area of warrants for electronic surveillance, recognized the unreasonableness of prior announcements of purpose which could provoke the escape of the criminal or the destruction of critical evidence. *Katz v. United States*, 389 U.S. 347, 355, n.16 (1967); *Ker v. State of California*, 374 U.S. 23, 37-41 (1963).

As the Supreme Court also aptly observed in *Fuentes v. Shevin*, 407 U.S. 67, 93, n.30 (1972), the "danger is all too obvious that a criminal will destroy or hide evidence or fruits of his crime if given any prior notice."

It does not particularly matter that no occupant of the premises is a suspect at the time the warrant is needed. In many cases, the label "nonsuspect" means only that the person's involvement in the crime has not as yet been established.

Further, the label "nonsuspect" is not synonymous with "trustworthiness." Whether a nonsuspect would destroy or simply disclaim knowledge or possession of the materials sought remains an open question, unanswerable in sufficient time or with sufficient concrete fact to prove that a subpoena would be impractical.

The present case presents an excellent example of the propensity of a third-party to sympathize with criminal suspects, even absent a familial relationship or friendship. The February 1970 editorial announcement of Daily policy asserted:

Responding to . . . the realities of government subpoenas, the Daily staff has voted to accept the following policy for reporting meetings and demonstrations.

. . . .

3) Negatives which may be used to convict protestors *will be destroyed*. We feel that a line can and should be drawn at this point between journalistic responsibility and cooperation with government authorities in protests that are often directed against the government. . . .

The Daily feels no obligation to help in the prosecution of students for crimes related to political activity. . . . (Emphasis added) (App. 117-118.)

A Daily editorial published the day after the execution of the warrant reiterated this policy of noncooperation:

It has been the Daily's *standing policy to destroy all potentially incriminating unpublished photographic material*. . . . [This policy is necessary] for a news organization to keep itself from becoming a filing service for evidence to be used in civil and criminal courts. . . .

. . . The use of searches, *subpoenas*, and *all other forms of governmental harassment* obviously have a chilling effect on the freedom of the media. . . . (Emphasis added) (App. 119-120.)

(4) The unnecessary delays will have serious consequences.

The two additional showings required by the new rule—that is, the suspect status of someone occupying the premises or, if that is not established, then the impracticality of a subpoena—frequently will delay the issuance of warrants. Such delays could have serious repercussions since it is necessary that search warrants be executed with some degree of promptness in order that the facts upon which the initial elements of probable cause were based do not become dissipated. *See, United States v. Nepstead*, 424 F.2d 269, 271 (9th Cir. 1970).

(5) A subpoena was impractical in this case.

It is doubtful that a subpoena duces tecum was, or ever could be, practical in this case. As the affidavit of Craig Brown established, there was ample reason to surmise a subpoena would be futile, and no regular court process was available at the time. (App. 149-154.)

The district court, based on *ex parte* information, rejoined that the grand jury convened two hours after the warrant was executed and a subpoena could have been made returnable to it. (Petition, App. C, 13-14, 18, n.2.) The court erred in assuming the grand jury procedure could have been tapped to subpoena the news pictures sought. In *In re McGowen*, 303 A.2d 645 (Del. 1973), the court held invalid an Attorney General subpoena for news pictures sought to identify criminals, as in the instant case, because it “was issued to implement a routine police investigation, not

a grand jury or an Attorney General investigation.” 303 A.2d at 647.

The statutory and historical scope of the Attorney General’s subpoena power may not be thus broadened. Nor may its purpose be extended or its usage delegated, absent statutory enlargement, so as to transform its original grand jury function into a police instrumentality. [*Id.*]

Similarly, in California, the grand jury functions are not coextensive with routine police investigations. A grand jury subpoena is limited to witnesses whose testimony is material in an investigation actually before the grand jury. CAL. PEN. CODE § 939.2 (West 1977). The grand jury may not receive evidence unless admissible over objection at the trial of the criminal action. CAL. PEN. CODE § 939.6(b) (West 1970).

No such grand jury investigation was in progress in this case, and we cannot merely assume, as the district court does, that the grand jury would have accepted the case or that the evidence sought would have been admissible if it did, since we cannot know the scope of the case. Moreover, it is beyond the authority of a federal court to order a state district attorney, in effect, to turn over his case to an independent body for handling.

(6) A grand jury subpoena is not a reasonable alternative.

It is unreasonable to require, as a matter of law, resort to a California grand jury subpoena in any case. The time problems are obvious. A substantial amount of time must elapse to impanel or convene a grand jury; to review the case by the criminal com-

plaint committee and to accept the investigation by the grand jury; to identify, locate, and serve the subpoenaed witness; to assemble the subpoenaed materials; and to process motions to quash and similar matters. If the evidence then is not produced or is not producible pursuant to the subpoena, opportunity for warrant acquisition may have vanished.

In addition, California has severely curtailed access to grand juries on criminal matters. The average California grand jury devotes over 85 percent of its time to civil matters. They returned indictments in 1972 constituting only 3.8 percent of all felony filings in California. JUDICIAL COUNCIL OF CALIFORNIA, 1974 REPORT TO THE GOVERNOR AND THE LEGISLATURE 30, 42 [hereinafter REPORT]. The grand jury calendar is frequently overloaded. Criminal complaint committees dislike to recommend that the grand jury hear a case absent a compelling reason why a preliminary hearing before the municipal court would not serve the ends of justice. REPORT at 43.

Further, the new rule will have an impact on persons eventually prosecuted for the crime. While a California defendant may suppress evidence illegally seized by warrant from a "third party" (*Kaplan v. Superior Court*, 6 Cal.3d 150, 161, 98 Cal.Rptr. 649, 656, 491 P.2d 1 (1971); *People v. Martin*, 45 Cal.2d 755, 759-761, 290 P.2d 855 (1955)), the suppression remedy is unavailable where evidence not belonging to the defendant is produced pursuant to a "third party" subpoena (*People v. Warburton*, 7 Cal.App.3d 815, 823-824, 86 Cal.Rptr. 894, 898-899 (1970)).

B. It is not established that search warrants have involved only suspects.

The district court's second reason was a historical one:

Second, as a historical matter the notion of search warrants has involved only those suspected of a crime . . . (Petition, App. C, 22.)¹¹

The court's three citations provide no authority for the statement.¹² Moreover, the proposition runs contrary to the oft repeated statement that the consti-

¹¹The court did not explain why this assertion, if true, is relevant to a constitutional analysis in a modern context.

¹²The court cited first the brief discussion in *Henry v. United States*, 361 U.S. 98, 100 (1959), of the colonial general warrant and writs of assistance. It is noted therein that the 1776 Declaration of Rights of Virginia and Maryland condemned general warrants which allowed the search of "suspected places," or the apprehension of "suspected persons," without naming or describing the place or person, or describing the person's offense and supporting it by evidence. Allowing police to arrest or search on suspicion with no showing of probable cause before a magistrate was deemed the "oppressive practice" to be prevented. Around the time the Fourth Amendment was adopted, the decisions held that rumor, suspicion, or even "strong reason to suspect" were not adequate to support an arrest warrant; more of a showing was required. Taking all of this together, one cannot distill a general principle that search warrants, as opposed to arrest warrants, involved only suspected persons.

The court's second citation to KAPLAN, *Search and Seizure: A No-Man's Land in the Criminal Law*, 49 CALIF. L. REV. 474, 475-477 (1961) adds nothing: A general history of search warrants from early common law, where they were unknown, through presently-recognized grounds for their issuance. The closest relevant reference is that, during the earlier years of our country, search warrants could not issue to discover evidence of a crime unless the evidence happened to fall into certain restricted categories, such as contraband. The "mere evidence" rule is now discarded as a general principle.

The district court's quotation from *United States v. Poller*, 43 F.2d 911, 914 (2d Cir. 1930) is taken out of context, is incomplete, and does not support the proposition.

tutional provisions make no distinction between the guilty and the innocent; the Fourth Amendment protects the innocent as well as suspects. See, for example, *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 356-357 (1931); *People v. Cahan*, 44 Cal.2d 434, 439, 282 P.2d 705 (1955).

C. A search warrant does provide meaningful protection to a third party, even when First Amendment interests are involved.

The district court's third and major point was a policy consideration:

Third, if law enforcement agencies were not required to first explore the subpoena alternative in third-party situations, a third-party would receive no meaningful protection against an unlawful search, and there would be the rather incongruous result that one suspected of a crime would receive *greater* protection against unlawful searches than a third party. . . . (Petition, App. C, 23.)

The court reasoned as follows: The suppression of illegally obtained evidence is the chief remedy against an unlawful search. Its basic purpose is as a deterrent,¹³ and no other meaningful remedy exists for the victim of an unlawful search. A third-party "does not have the protection or deterrent of the exclusionary

¹³It has been pointed out that there is no convincing evidence that the exclusionary rule actually tends to prevent unreasonable searches and seizures. See the discussion of the efficacy of the exclusionary rule in *Stone v. Powell* (1976) 428 U.S. 465, 492, n.32, 493, n.34.

rule, for by definition,¹⁴ he is not about to be tried for a crime." Therefore, an additional safeguard is necessary to protect his Fourth Amendment rights. That protection is the obligation of law enforcement to use a subpoena duces tecum unless it is shown to be impractical. (Petition, App. C, 22-25.) This syllogism is fallacious since the major premises are untrue.

(1) Other meaningful remedies do exist.

California officers may be sued in either the federal court or state court for damages or for an injunction under Section 1983 if their conduct violates a person's Fourth Amendment rights. See, *Monroe v. Pape*, 365 U.S. 167 (1961). They also may be sued under the criminal provisions of the federal Civil Rights Act, 18 U.S.C.A. §§ 241, 242 (1970) if the requisite "purpose to deprive a person of a specific constitutional right" is present. See, *United States v. Price*, 383 U.S. 787 (1966).

A person who maliciously and without probable cause procures the issuance of a search warrant is liable civilly for malicious prosecution as well as criminally under California Penal Code, Section 170 (West 1970). 17 CAL.JUR.3d, Criminal Law § 380 (1975).

Either under statutory provisions or under the principles of the general law, the victim may have a civil action against the offender for damages for tres-

¹⁴The district court failed to recognize in its analysis of "third party" situations that a person who appears to be a nonsuspect at the outset of an investigation may well become the criminal defendant. This is particularly true in situations, such as the instant case, where the items sought are intended for use in identifying the perpetrator of a felony.

pass, and is entitled to recover his property other than contraband, together with damages for its detention or destruction. 17 CAL.JUR.3d, Criminal Law §§ 377, 378, 379, 381 (1975).

Every public officer who seizes any property without authority is guilty of a misdemeanor. CAL. PEN. CODE § 146 (West 1970). An officer making an unlawful search of the person may also be liable to criminal prosecution for false imprisonment. CAL. PEN. CODE § 236 (West 1970).

The victim of an unlawful search may file a complaint seeking to invoke disciplinary action against an offending officer. 44 CAL.JUR.2d, Searches and Seizures § 52 (1958).

It is also a crime in California to open, read, or publish wilfully and without authority a sealed letter (CAL. PEN. CODE § 618 (West 1970)) or a telephonic or telegraphic communication addressed to another (CAL. PEN. CODE § 637.1 (West 1970)). Civil damages for a violation of the latter is \$3,000 or treble actual damages, whichever is greater. CAL. PEN. CODE § 637.2 (West 1970).

Finally, where a magistrate acts without jurisdiction in issuing a warrant, as by failing to comply with the preliminary requisites or by issuing a general warrant, the magistrate may be liable in trespass to the injured party. 17 CAL.JUR.3d, Criminal Law § 380 (1975).

In assessing the meaningfulness of these state and federal remedies, three things must be kept in mind.

First, unlike the exclusionary rule, they *do* afford direct vindication of Fourth Amendment rights and, in most cases, significant monetary recompense to the victim. Second, unlike the exclusionary rule, the remedies are generally available even if no evidence is seized or the seized materials are not needed for a conviction. Third, if the victim is truly an innocent third-party, the "prejudice against 'criminals'" cited as the major fault of remedies other than the exclusionary rule (*see, Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 423 (1971) (Burger, J., dissenting)) simply does not exist.

(2) A third-party search does have the deterrent protection of the vicarious exclusionary rule.

The California Supreme Court has adopted the rule that the legality of a search and seizure may be challenged by anyone against whom evidence from the search and seizure is used, regardless of his lack of interest in the premises searched or in the property seized, and despite the fact that his own constitutional rights have not been violated. *People v. Martin*, 45 Cal. 2d 755, 290 P.2d 855 (1955); *see, also, Kaplan v. Superior Court*, 6 Cal.3d 150, 161, 98 Cal.Rptr. 649, 491 P.2d 1 (1971); WITKIN, CALIFORNIA EVIDENCE § 76, pp. 72-73 (2d ed. 1966); 17 CAL.JUR.3d, Criminal Law § 331 (1975).

California also follows the federal role in excluding from evidence any secondary fruits of an unlawful search and seizure, and excludes, additionally, mental

impressions as well as material things seized. 17 CAL. JUR.3d, Criminal Law § 334 (1975).

(3) No additional protections are required for newspapers.

We do not disagree with the district court's proposition that the magistrate should consider whether First Amendment interests are involved. (Petition, App. C, 28.) This proposition, however, does not dictate the radical rule espoused by the district court in this case.

In *Marron v. United States*, 275 U.S. 192, 196 (1927), this Court pointed out that the requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.

Thus, in cases involving newspapers, as in this case, the materials should be described with exacting particularity; the search should be narrowly confined to the limits of the warrant; and the warrant should be executed during business hours so that the acts of the officers can be observed.

D. There is no recognized legal authority for the third-party ruling.

(1) The district court cited no persuasive authority.

The district court's final reason was by analogy to a federal rules case concerning detention of a material witness rather than a state search warrant situation:

A fourth factor supporting the requirement for the subpoena duces tecum alternative unless 'impractical' is the *Bacon* case As plaintiffs have argued [by analogy], if one not suspected of a crime cannot be *arrested* unless there is probable cause to believe that a subpoena is impractical, one not suspected of a crime cannot be *searched* unless there is probable cause to believe that a subpoena duces tecum is impractical.¹⁵ (Petition, App. C, 25-26.)

The district court misread *Bacon* and its applicability to a state search warrant case. In holding the detention of Bacon under a federal material witness arrest warrant invalid, the Ninth Circuit reasoned as follows: A federal district court may compel the performance of a witness' duty to testify before a federal grand jury. The actual power to detain a material

¹⁵In a footnote the court stated, "On the point that searches historically have been more protected than arrests, see generally, *Kaplan, op. cit.*" (App. C, 26.) The same point is put forward at page 20 as a justification for extending the *Bacon* "rule" to the instant case.

The court clearly erred in its reading of the text authorities cited. *Kaplan* only noted that more attention had been focused on search situations than arrest situations in the Eighteenth Century:

[A]lthough the [fourth] amendment encompasses arrest as well as search, its history shows that the founders of the Republic were much more concerned with freedom from arbitrary search than from arrest. [KAPLAN, *Search and Seizure: A No-Man's Land in the Criminal Law*, 49 CALIF. L. REV. 474, 475 (1961).]

Kaplan opines that there is actually "little to choose" between the two in terms of indignity. *Id.*

Orfield's article is even further from the point. A 59-page compilation of law on federal arrest warrants with scant mention of search warrants, there is no discernible support for the court's statement. See, ORFIELD, *Warrant of Arrest and Summons Upon Complaint in Federal Criminal Procedure*, 27 U. CIN. L. REV. 1 (1958).

witness was inferrable from Rule 46(b) and Section 3149 providing for bail and conditions of release. The statutory preconditions for imposing either bail or conditions of release was a showing by affidavit (1) that the testimony of the person is material in a criminal proceeding, and (2) that it may become impracticable to secure his presence by subpoena. By analogy to traditional search warrant and arrest warrant situations, the Ninth Circuit indicated these two statutory preconditions thus constituted the requisite justification for arrest under the Fourth Amendment. By further analogy, the Court stated the judicial officer issuing the warrant, not merely the federal officer drafting the complaint, must have probable cause to believe the two preconditions exist; *i.e.*, the conclusory statements in the *Bacon* complaint for the warrant were not sufficient since the magistrate was not apprised of the underlying facts and circumstances.

The Ninth Circuit understandably did not address itself to the further issue of whether it would find a requirement for such a showing in the absence of the specific directives in the enabling legislation¹⁶ or, if so, whether on a constitutional basis or under the Court's supervisory power over the federal system.

Nor did the Court go the further step of determining whether such requirement legitimately could and

¹⁶The district court appeared to be of the opinion that the Ninth Circuit had answered the question *sub silentio*. The district court said:

that the courts read the Federal Rules of Criminal Procedure as implementing Fourth Amendment protections, and a rather strong presumption exists that the procedures mentioned in

should be imposed on state search warrants. We think they should not. While the Fourth Amendment covers seizures of both persons and objects, "it does not follow that the test of propriety with respect to the two subjects has been or should be precisely the same." *United States v. Hall*, 348 F.2d 837, 841 (2d Cir. 1965).

The district court admitted that:

neither the Court nor the parties have come across any case which discusses the problem of when law enforcement agencies must use a subpoena duces tecum rather than a search warrant¹⁷ (Petition, App. C, 14.)

the Federal Rules are required by the Fourth Amendment. See *Giordenello v. United States*, 357 U.S. 480, 485 (1958). *Jones v. United States*, 357 U.S. 493 (1958) (Petition, App. C, 19.)

We believe the court was in error. Neither case suggests that the federal rules *interpret* the constitution vis-a-vis general applicability to state procedures.

The federal rules neither add to, nor detract from constitutional provisions in a general sense. For example, Rule 41 embodies standards conforming with the requirements under the Fourth Amendment but is not coextensive therewith but more specific and stringent. Violations of Rule 41 do not in and of themselves amount to violations of the Fourth Amendment. *United States v. Haywood*, 464 F.2d 756 (D.C. Cir. 1972).

By the same token a state search warrant need not meet all requirements of Rule 41 to be constitutional. *United States v. Harrington*, 504 F.2d 130 (7th Cir. 1974); *United States v. Sellers*, 483 F.2d 37 (5th Cir. 1973), *cert. denied*, 417 U.S. 908.

¹⁷The district court acknowledged that three warrantless cases relied upon by plaintiffs concerning Fourth Amendment rights of third parties generally were inapposite. (Petition, App. C, 15.) In fact, the court admitted that:

Newberry [v. Carpenter], 107 Mich. 567 (1895) could be read to permit a third party search with a warrant (Petition, App. C, 15.)

Although the court itself placed no specific reliance on the other two cases, it did assert that they "indicate that a search of a third party even with a warrant will not satisfy the requirements of the Fourth Amendment." (Petition, App. C, 15.) The court read

It would appear, however, that *warrantless* searches are the norm in third-party cases. Warrantless searches are permitted in those instances where prompt inspections are required; even administrative areawide search warrants need not be confined to cases in which the inspector possesses probable cause to believe a particular dwelling contains a code violation. *Camara v. Municipal Court*, 387 U.S. 523 (1967).

In California, warrantless predeparture screening of all airline passengers and carry-on baggage has been held reasonable. The California Supreme Court found support under the Fourth Amendment in the series of United States Supreme Court decisions relating to administrative searches, starting with *Camara* in 1967. *People v. Hyde*, 12 Cal.3d 158, 165, 115 Cal.Rptr. 358, 524 P.2d 830 (1974).

Warrantless searches without probable cause also are permitted of various regulated businesses (*United States v. Biswell*, 406 U.S. 311 (1972); *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970); *People v. Conway*, 42 Cal.App.3d 875, 891, 117 Cal.

far too much into these two state cases. In *Owens v. Way*, 82 S.E. 132 (Ga. Sup. Ct. 1914), it was held that a municipal officer had no power to take the iron safe of B from B's premises without a search warrant as incident to the arrest of A. In any case, it is not clear that B in the *Owens* case was a third party, since his safe was thought to contain contraband liquor. The crime in question was the purchase of the whiskey from B's clerk on B's premises with the approval of B's nephew A, against whom the evidence was sought.

Similarly, *Commodity Mfg. Co. v. Moore*, 198 N.Y.S. 45 (1923) involved the warrantless seizure of evidence, incident to an arrest, which disclosed a motive for arson. The documents were not subject to seizure, even under warrant, not because they belonged to someone other than the arrestee but, rather, because they constituted "mere evidence".

Rptr. 251 (1974); *People v. Grey*, 23 Cal.App.3d 456, 100 Cal.Rptr. 245 (1972); *People v. Lisner*, 249 Cal. App.2d 637, 57 Cal.Rptr. 674 (1967)), persons and objects crossing our international borders (*Almeida-Sanchez v. United States*, 413 U.S. 266 (1973); *Blefare v. United States*, 362 F.2d 870 (9th Cir. 1966); *Witt v. United States*, 287 F.2d 389 (9th Cir. 1961)), and vehicles in certain instances (*Harris v. United States*, 390 U.S. 234 (1968); *Lipton v. United States*, 348 F.2d 591 (9th Cir. 1965)).

By analogy to this long line of warrantless, third-party searches, it follows that a search pursuant to a narrowly-drawn warrant is more than adequate to meet Fourth Amendment concerns.

(2) **The ruling conflicts with established precedent.**

In order to avoid duplication of argument, we refer to the brief of Petitioners Bergna and Brown relative to the point that the third-party search holding is in direct conflict with precedent. We note in addition that this Court specifically said in *Camara v. Municipal Court*, 387 U.S. 523, 534-535 (1967) that a search for items in a regular criminal investigation "is 'reasonable' when there is 'probable cause' to believe that they will be uncovered in a particular dwelling."

In the instant case, the warrant complied with settled interpretation of the Fourth Amendment's probable cause requirement. Plaintiffs must persuade this Court of the wisdom and necessity to follow a contrary course. They have not persuaded the Sixth Circuit, which forthrightly rejected the third-party ruling in its entirety:

Appellants argue that as "... innocent and uninvolved third parties, [they] were deprived of their Fourth and Fifth Amendment rights due to failure of the government to utilize a subpoena *duces tecum* or demonstrate its impracticality before applying for a warrant to search safe deposit box # 127." Once it is established that probable cause exists to believe a federal crime has been committed a warrant may issue for the search of any property which the magistrate has probable cause to believe may be the place of concealment of evidence of the crime. The necessity that there be findings of probable cause as to two factors—the commission of a crime and the location of evidence—affords protection from unreasonable searches and seizures, which are the only ones forbidden by the Fourth Amendment. We are not persuaded that the contrary rule adopted by the district court in *Stanford Daily v. Zurcher*, 353 F.Supp. 124 (N.D. Calif. 1972), is required by either the Fourth or Fifth Amendments or the Federal Rules of Criminal Procedure. [*United States v. Mfrs. Nat. Bank of Detroit, Livernois-Lyndon Streets, Safety Deposit Box #127, Detroit, Mich.*, 536 F.2d 699, 702-703 (6th Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977).]

See also *State v. Tunnel Citgo Services*, 149 N.J. Super. 427, 374 A.2d 32, 35 (1977), quoting the *Manufacturer's* case with approval.

II

SECTION 1983 LIABILITY WAS ERRONEOUSLY EXPANDED TO INCLUDE PERSONS WITHOUT FAULT OR INVOLVEMENT IN THE EVENTS GIVING RISE TO THE ALLEGED CIVIL RIGHTS DEPRIVATION

In order to state a Section 1983 claim, a plaintiff must plead and prove a deprivation of a constitutional right by a defendant who is acting under color of state law. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970). Such pleading and proof is necessary to confer jurisdiction on a federal district court and such a case must be analyzed in accordance with tort principles. *Pierson v. Ray*, 386 U.S. 547, 556 (1967); *Rizzo v. Goode*, 423 U.S. 362 (1976); *Bowens v. Knazze*, 237 F.Supp. 825 (N.D. Ill. 1965). Accordingly, for judgment to be rendered against these petitioners, it must be shown that they breached a duty owing to these plaintiffs. Stated another way, it must be shown that they acted in violation of some law to the plaintiffs' deprivation. Such a showing was never made herein. Rather, the facts demonstrate that these petitioners acted in full compliance with the then existing law in the area of search and seizure pursuant to warrant.¹⁸

Officer Peardon breached no duty owed to these plaintiffs by his act in signing the affidavit in question.

¹⁸California law relative to search warrants is found in California Penal Code, Sections 1523, *et seq.* Section 1525 requires the submission of an affidavit which must contain facts to establish probable cause as set forth in Sections 1524 and 1527. Section 1528 provides that the search warrant then issuing will command a peace officer to search the person or place named and Section 1529 prescribes the form of the warrant.

The truth of the matters contained in his affidavit has never been disputed. He did not violate any constitutional right of these plaintiffs by signing a truthful statement of facts, but rather was performing his duty. No case has been found which holds that this act alone could in any way give rise to a Section 1983 violation. Accordingly, no jurisdiction could be conferred on the district court as to Peardon for signing the affidavit.

As to the police officers who executed the warrant, including Peardon, it cannot be said that they, in their official or personal capacities, violated any duty owed by them to the plaintiffs. They were in the process of executing a judicial order¹⁹ and were not acting independently. Their actions in execution were the direct acts of the Court; such officers being an arm of the Municipal Court in this context. *Salvati v. Dale*, 364 F.Supp. 691 (W.D. Penn. 1973). Accordingly, they could not be held to have violated any civil rights of the plaintiffs herein. So long as they acted to carry out the judicial functions of the Court in executing a warrant fair on its face, no claim under Section 1983 may be stated against them whether it be for damages, injunction or equitable relief. *Steinpreis v. Shook*, 377 F.2d 282, *cert. denied*, 389 U.S. 1057; *Rhodes v. Houston*, 202 F.Supp. 624 (D. Neb.), *affirmed*, 309 F.2d 959, *cert. denied*, 383 U.S. 971.²⁰

¹⁹The issuance of a search warrant in California is a judicial act and constitutes an adjudication that probable cause exists for the search. *Arata v. Superior Court, In and For San Mateo County*, 153 Cal.App.2d 767, 315 P.2d 473 (1957).

²⁰*Rhodes v. Houston*, *supra*, involved a prayer for damages and injunction. At page 636, the Court considered the limited immu-

Considerable authority now holds that judges, acting within their judicial function, are absolutely immune from civil suits under Section 1983, including actions for damages as well as injunctive and/or declaratory relief. *Mackay v. Nesbitt*, 285 F.Supp. 498 (D. Alaska 1968), *affirmed*, 412 F.2d 846 (9th Cir. 1969), *cert. denied*, 396 U.S. 960; *Atchley v. Greenhill*, 373 F.Supp. 512 (S.D. Tex. 1974), *affirmed*, 517 F.2d 692, *cert. denied*, 424 U.S. 915; *contra*, *United States v. McLeod*, 385 F.2d 734 (5th Cir. 1974), *but see Hill v. McClennan*, 490 F.2d 859 (5th Cir. 1974); *Mirin v. Justices of Supreme Court of Nevada*, 415 F.Supp. 1178 (D. Nev. 1976); *Gregory v. Thompson*, 500 F.2d 59 (9th Cir. 1974).²¹ Accordingly, if the judge who issued the warrant in question did so within his judicial function, then his actions and those who carried out his command are protected by the principle of judicial immunity from any type of Section 1983 claim and jurisdiction is lacking as to such persons. It is clear that the judge in this case acted within his judicial function and equally clear that the

nity of law enforcement officers, but then stated: "Nonetheless, authorities performing orders issuing from a court are provided immunity when they do nothing other than perform such orders." *Steinpreis v. Shook*, *supra*, placed reliance on the fact that the sheriff's duties were mandatory in carrying out court orders. California Code of Civil Procedure, Section 262.1 makes the execution of a search warrant mandatory on the officer receiving it and also provides that the officer is justified in its execution whatever may be the defect in the proceedings upon which it issued.

²¹Of course, it has long been established that judges are immune from damage awards under Section 1983; Section 1983 being held not to have abrogated the long standing doctrine of judicial immunity. *Pierson v. Ray*, *supra*, at 555.

police officers acted pursuant to his order and are thereby protected."

To make a contrary holding would totally disrupt the functioning of courts and police officers, for police officers would have to scrutinize and question every warrant given to them. They would find themselves in an untenable position of being compelled to refuse to execute a warrant (and be penalized for their non-compliance) or of executing the warrant and being held liable for a violation of Section 1983 as occurred in this case. Such a position is unfair for a police officer does not have the training of a lawyer and is not expected or allowed to determine whether a search warrant regular on its face is invalid. *Pierson v. Ray*, 386 U.S. 547; *Bowens v. Knazze*, 237 F.Supp. 826 (N.D. Ill. 1965).

Also, it should be pointed out that no showing was ever made that these police officers knew, or should have known, that the procedure followed in applying for the warrant was improper. Nor was a showing made that they knew, or should have known, that the warrant itself was in fact violative of plaintiffs' rights.

¹⁰Petitioners also maintain that police officers who do not act pursuant to judicial order but who believe, in good faith, that their conduct is proper are entitled to present a defense of action taken in good faith even in Section 1983 cases involving a prayer for relief other than damages, where the constitutional question is one of first impression. This is grounded on the judicial premise that a police officer is not expected to be able to predict the future course of constitutional law, *Pierson v. Ray*, *supra*; nor is a police officer to be penalized for his actions where the constitutional standard has yet to be articulated by the courts. *Bowens v. Knazze*, *supra*. The deprivation of this defense will have a harmful effect on effective law enforcement, for it will result in indecision from fear of retribution.

Indeed, such a showing could not have been made since the warrant fully complied with all of the then known constitutional and statutory requirements. Therefore, there is no basis for a finding that these police officers violated plaintiffs' rights through any independent action of their own. Accordingly, none of the police officers breached any duty owing to these plaintiffs under Section 1983 and there was no jurisdiction in the lower courts to find such.

Finally Police Chief Zurcher was not a proper party to this lawsuit since it is clear that there can be no respondeat superior liability under Section 1983. *Rizzo v. Goode*, *supra*; *Milton v. Nelson*, 527 F.2d 1158 (9th Cir. 1976). Rather, personal involvement through prior knowledge and/or acquiescence is needed at a minimum for jurisdictional purposes.

No personal involvement or prior knowledge of the securing of the warrant and its execution was alleged as to Chief Zurcher. Plaintiffs did not rectify this situation in their subsequent motion for summary judgment, for they did not submit any affidavits in support thereof showing any personal involvement or prior knowledge on Chief Zurcher's part.

Yet the Ninth Circuit (Petition, App. A, 2), states that it will hold him as a defendant to "enjoin [him] from . . . permitting [his] subordinates from engaging in such illegal conduct in the future." Such reasoning is faulty. A declaratory judgment concerning past acts was rendered against him. Injunctive relief was denied. Further, there was no showing he permitted any illegal conduct in the first instance.

The cases of *Schnell v. City of Chicago*, 407 F.2d 1084 (7th Cir. 1969) and *Hernandez v. Noel*, 323 F.Supp. 779, 783 (1970) relied upon by the Court are not on point. (Petition, App. A, 2.) In both cases, the governmental officials had knowledge of the unconstitutional conduct of their subordinates and failed to prevent a recurrence of such misconduct, thus arguably justifying the imposition of injunctive relief. In this case, not only is such knowledge and failure to act absent, but injunctive relief was denied. (The supposed threat of future violation mentioned in Footnote 1) is inapplicable to the Chief and the other police petitioners in any case since it is derived solely from the pleadings of their co-defendants.)

Accordingly, jurisdiction was lacking under Section 1983 as to Chief Zurcher and the other police officers.

III

THE CIVIL RIGHTS ATTORNEYS' FEES AWARDS ACT OF 1976 SHOULD NOT BE RETROACTIVELY APPLIED IN GENERAL OR IN THIS CASE

The decision of the Ninth Circuit recognized that *Alyeska Pipeline Service Company v. The Wilderness Society*, 421 U.S. 240 (1975) did away with the legal basis (private attorney general doctrine) for the fee award given to plaintiffs by the district court, which fees were initially awarded August 10, 1973.²³

²³In order to avoid duplication in the printing of this brief, police officer petitioners refer to the arguments contained in Petitioners Bergna's and Brown's brief relative to attorneys' fees and adopt

While the decision of the district court was pending on appeal, Congress enacted Public Law No. 94-559, 90 Stat. 2640 (October 19, 1976) authorizing attorneys' fees, in the court's discretion, to the prevailing party in Section 1983 cases. The Ninth Circuit then held that such new law applied retroactively to the instant case not only from the standpoint that this case was pending at the time of enactment, but also for services rendered in the district court long before the effective date of the new law. (Petition, App. A, 4, 5, 6.)

The Act does not state on its face whether it is to be applied retroactively. The decision of the Ninth Circuit reviewed the legislative history and found, without adequate basis therein, that the new law revalidated the fees awarded for services rendered some three years before the effective date. The Court pointed to 122 Cong. Rec. 17052 (daily ed., September 29, 1976) for the principle that the new law would not only operate on cases filed after its effective date, but would also apply to pending cases. However, this history also states that the Act is retroactive only to the extent of pending cases being capable of fee awards and does not in any way *clearly state* that fees should be awarded for services rendered long prior to its effective date.

them herein; namely, that the Act does not abrogate the absolute immunity afforded to judges and those who carry out their orders, that there is no threshold congressional authorization which allows a Section 1983 suit to be brought against a public entity, and that abrogation of the absolute immunity afforded to judges and those who carry out their orders would exceed the permissible scope of Section 5 of the Fourteenth Amendment.

If the purpose of the Act is to encourage enforcement of citizens' civil rights, Senate Report No. 94-1011, it is submitted that retroactive awards of attorneys' fees for services rendered long before the enactment of the Act would not serve the purpose of encouraging future challenges of alleged deprivations of civil rights. *Johnson v. Combs*, 471 F.2d 84 (5th Cir. 1972).²⁴ As stated in *Johnson*, at p. 87:

Under these circumstances, a retroactive application of this statute would punish school boards for good faith action in seeking the guidance of the courts to determine what was required of them. Furthermore, retroactive awards of attorney's fees for these past years of litigation would not serve the purpose of encouraging future legal challenges of segregated school systems. The inconclusive legislative history of Section 718 furnishes no basis for inferring that Congress intended this provision to be given such a sweeping effect.

The police officers herein acted in good faith in the execution of the search warrant pursuant to court order. To hold them responsible for attorneys' fees of \$47,500.00 for services rendered more than three years before the Act's effective date would not serve to carry out the purpose of the Act. Rather, such application would only serve to punish them.

²⁴Admittedly, *Johnson v. Combs*, *supra*, was decided before *Bradley v. School Board of City of Richmond*, 416 U.S. 696 (1974). However, the reasoning in *Johnson* is persuasive on effecting the Congressional purpose for any future civil rights deprivations as contrasted with past acts, and we ask the Court to consider it; especially since the instant case involved a question of first impression and the police officers executed a warrant fair on its face.

The decision of the Ninth Circuit was further in error in that it did not consider the rule of not applying new legislation retrospectively where "manifest injustice" would result as discussed in *Bradley v. The School Board of the City of Richmond*, 416 U.S. 696 (1974).

According to *Bradley*, *supra*, 416 U.S. at 718, the Court must consider whether applying new law retrospectively to pending cases would result in "manifest injustice" and if so such application should not be had. In determining if such injustice occurs, the court looks to the (a) nature and identity of the parties, (b) the nature of their rights and (c) the nature of the impact of the change in the law upon those rights.

Applying the new attorneys' fees law to the instant case clearly results in manifest injustice. The instant parties are individuals and are not publicly funded governmental entities or classes of persons as found in *Bradley*. The search complained of was a one-time brief occurrence and was not a day-to-day activity whereby the parties had an ongoing and frequent relationship. Furthermore, the parties had equal respective abilities to present and protect their interests.

As to the nature of the rights of the parties, the petitioners had a strict duty and right to perform the search that was commanded by the warrant since the warrant was regular on its face and fully comported with applicable warrant law at the time the warrant

was actually issued and the search conducted. In fact, petitioners would be subject to contempt charges had they not executed the warrant. At such time, petitioners were not subject to impositions of attorneys' fees for conducting lawful searches and had the right to perform their duties without such sanction. To now impose fees upon them for performing duties legal at the time would be to deprive them of the right to rely upon law dictating their actions and for which no sanction existed.

As to the nature of the impact of the change in the law upon the existing rights of petitioners, it should be pointed out that the new law presents new and unanticipated obligations upon these petitioners. For how were these police officers to know that by executing a search warrant comporting with existing constitutional standards that they would be violating any rights of the respondents and that they would be subject to paying attorneys' fees for merely performing their duties? At the time of the search, no law existed which proscribed the actions of petitioners in the execution of the warrant or made them liable for attorneys' fees for obeying a court order. The instant case is very much different than the *Bradley* situation since the school board in *Bradley* was not conforming to well known constitutional standards regarding non-discriminatory public education and knew or should have known that it was subject to the imposition of attorneys' fees for its actions. However, these petitioners were conforming to the constitutional standards known at the time and later

became embroiled in litigation characterized by the district court as being one of first impression. Clearly, these petitioners had the right to defend themselves in this case and to test the declaratory judgment by appeal without having imputed to them knowledge that their defense would result in the imposition of attorneys' fees under the private attorney general theory which by case history only applied when a defendant did not comport with well known constitutional guidelines.

Accordingly, it is clear that manifest injustice would result to these petitioners if the new law applied retrospectively to them.

CONCLUSION

Petitioners respectfully request that the judgment of the Court of Appeals be reversed and the case dismissed.

Dated, County of Santa Clara, California,
November 9, 1977.

Respectfully submitted,

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1484

JAMES ZURCHER, et al., *Petitioners*,

VS.

THE STANFORD DAILY, et al., *Respondents*.

No. 76-1600

LOUIS P. BERGNA, District Attorney, et al., *Petitioners*,

VS.

THE STANFORD DAILY, et al., *Respondents*.

On Writs of Certiorari to the United States Court of Appeals
for the Ninth Circuit

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IN THE Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1484

JAMES ZURCHER, Chief of Police of the City
of Palo Alto, County of Santa Clara, State
of California, JIMMIE BONANDER, PAUL
DEISINGER, DONALD MARTIN and
RICHARD PEARDON, all Police
Officers of the City of Palo
Alto, County of Santa
Clara, State of
California,
Petitioners,

vs.

THE STANFORD DAILY, FELICITY A.
BARRINGER, FRED MANN, EDWARD H.
KOHN, RICHARD LEE GREATHOUSE,
ROBERT LITTELMAN, HALL DAILY
and STEVEN G. UNGAR,
Respondents.

No. 76-1600

LOUIS P. BERGNA, District Attorney,
Santa Clara County, California, and
CRAIG BROWN, Deputy
District Attorney,
Petitioners,

vs.

THE STANFORD DAILY, et al.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals
for the Ninth Circuit

BRIEF FOR PETITIONERS BERGNA AND BROWN

OPINION BELOW

The opinion of the Court of Appeals reported at 550 F.2d 464, appears as Appendix A to the petitions for writ of certiorari; an opinion of the District Court adopted by the Court of Appeals and reported at 353 F.Supp. 125 appears as Appendix C to the petitions.¹

JURISDICTION

The Court of Appeals' order denying these petitions for rehearing and rejecting the suggestions for rehearing in banc, appearing as Appendix B to the petitions for writ of certiorari,² was filed on March 28, 1977. The petitions for writ of certiorari were timely filed, docketed in this Court on April 26 and May 16, 1977 and granted on October 3, 1977 (28 U.S.C. section 2101(c)). The jurisdiction of this

¹Two other opinions of the District Court not adopted by the Court of Appeals and reported at 366 F.Supp. 18 and 64 F.R.D. 680 appear as Appendices D and E to the petitions for writ of certiorari.

²The Court of Appeals' holding would, we submit, effectively invalidate California Penal Code section 1524, and would normally have provided basis for appellate jurisdiction under 28 U.S.C. section 1254(2). See Argument IE, *infra*. Appellate jurisdiction is not clear, however, because the District Court and the Court of Appeals ignored requests to consider section 1524 and did not expressly invalidate the statute in their opinions. See *Minnesota v. Alexander* (1977) 430 U.S. 977, Stevens, J., dissenting.

Moreover, failure to give notice to the California Attorney General as required by former sections 2281 and 2284 of Title 28 of the United States Code constitutes a significant defect in the proceedings. Although the Attorney General appeared as amicus curiae in the Court of Appeals and later entered as counsel for the District Attorney, the Chief Law Officer of the State should have had opportunity to participate fully in proceedings which led to section 1524 being effectively invalidated.

Court is conferred by Title 28, United States Code section 1254(1).³

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourth Amendment to the Constitution of the United States provides:

"The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

2. The Civil Rights Act of 1871, 42 U.S.C. section 1983, provides in pertinent part:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any

³Initially we note that this action arguably never presented a case or controversy. The Ninth Circuit held, in essence, that the threat of future similar searches of the Daily presented a case or controversy because the threat inhibited newsgathering. App. Pet. 35. The Ninth Circuit, however, did not question the good faith of petitioners and, that being the case, future similar searches cannot occur unless there again transpire events which give rise to probable cause to believe that there is evidence of a felony on the Daily's premises. The implication in the Ninth Circuit's opinion that the defendants admitted an intent to conduct similar searches is perhaps misleading. Plaintiffs' allegation that similar searches would take place was denied in defendants' answers. The portion of the answer of Defendants' Bergna and Brown which is relied on by the Ninth Circuit acknowledges only an intent to continue good faith enforcement of applicable California laws. Thus under *Younger v. Harris*, (1971) 401 U.S. 37, 41-42 there is no case or controversy. See also *Judice v. Vail* (1977) 430 U.S. 327.

citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or the proper proceeding for redress."

3. Public Law No. 94-559, 90 Stat. 2640 (October 19, 1976), provides in pertinent part:

"In any action or proceeding to enforce a provision of sections . . . 1979 [42 U.S.C. section 1983]. . . of the Revised Statutes, . . . the Court, in its discretion, may allow the prevailing party other than the United States, a reasonable attorneys' fee as part of the cost."

4. Section 1524 of the Penal Code of the State of California provides in pertinent part:

"A search warrant may be issued upon any of the following grounds:

"5. When the property or things to be seized consist of any item or constitute any evidence which tends to show a felony has been committed, or tends to show that a particular person has committed a felony.

"The property or things described in this section may be taken on the warrant from any place, or from *any person* in whose possession it may be." (Emphasis added).

QUESTIONS PRESENTED

1. Did the Ninth Circuit Court of Appeals err in holding that a search warrant violated the Fourth

Amendment solely because the supporting affidavit did not establish probable cause to believe that the occupant of the premises to be searched either participated in the crime or would not honor a subpoena duces tecum?

2. Does the Civil Rights Attorney's Fees Awards Act of 1976 attempt to abrogate the absolute immunity from money liability afforded to judges, prosecutors and those who carry out judicial orders and if it does, is such an attempt constitutionally permitted?

STATEMENT OF THE CASE

On May 13, 1971, the Stanford Daily of Stanford, California, a student newspaper, and seven members of the Daily's staff filed a complaint in the United States District Court for the Northern District of California. A 15-35. The complaint, under Title 42, United States Code section 1983, sought declaratory relief, a permanent injunction, and attorneys' fees. A 30-31. As defendants, the complaint named J. Barton Phelps, Judge of the Municipal Court for the Palo Alto-Mountain View Judicial District; Louis P. Bergna, District Attorney of Santa Clara County; Craig Brown, a deputy district attorney; James Zurcher, Chief of Police for the City of Palo Alto; and Palo Alto Police Officers Jimmie Bonander, Paul Deisinger, Donald Martin, and Richard Peardon. A 15-17.

On October 5, 1972, without waiting for depositions previously noticed by defendants, the District Court

issued its memorandum and order purportedly granting summary judgment. Only declaratory relief was granted, the court stating its anticipation "that [the] decision [would] be honored and that an injunction [would be] unnecessary." App. Pet. 36.

At plaintiff's request, the action against Judge Phelps was dismissed on December 15, 1972. A 190.

By memorandum and order of August 10, 1973 (App. D Pet.) the District Court granted attorneys' fees, and by memorandum and order of July 19, 1973 (App. E Pet.) these fees were fixed at \$47,500. Judgment was entered July 23, 1974 (App. F Pet.) and notice of appeal was filed August 21, 1974. A 9.

The Court of Appeals filed its opinion on February 2, 1977 (App. A Pet.) adopting the District Court's opinion of October 5, 1972 (App. C Pet.) holding that "law enforcement agencies cannot obtain a warrant to conduct a third party search unless the magistrate has probable cause to believe that a subpoena duces tecum is impractical." App. Pet. 26. The award of fees was sustained but on a different ground than that relied on by the District Court. Petitions for rehearing and suggestions for rehearing in banc were denied and rejected on March 28, 1977. (App. B Pet.) The mandate of the Court of Appeals has been stayed pending consideration by this Court. A. 14.

STATEMENT OF FACTS*

On Friday, April 9, 1971, members of the Palo Alto Police Department were called to the Stanford University Hospital to remove a large group of demonstrators. A 34, 170-171, 176-177, 180-181. After several unsuccessful attempts to persuade the demonstrators to leave peacefully, the officers forced their way through the demonstrators' barricade and into the offices of the hospital. A 170-183. While the main police advance was proceeding on the west side of the building, unknown persons armed with chair legs and other weapons attacked nine officers stationed on the east side. A 34, 704, 174-175. One of the nine officers was knocked to the floor and struck repeatedly on the head. A 174. The Daily reported that "several policemen were beaten to the ground by demonstrators armed with clubs," one officer suffering an apparent broken shoulder. A 104. See A 179. All nine officers were injured. A 104, 179. See App. Pet. 11.

No police photographer was located at the east end of the hospital and most news photographers were located at the west end, the site of the main resistance. A 152-153. Officer Peardon, who was one of the assault victims, did see at least one photographer taking photographs of the assaults from a position "directly behind the Palo Alto officers"; and, on Sunday, April 11, photographs appearing in a special edition of the Stanford Daily indicated that

*This statement is based upon affidavits supporting and opposing summary judgment and on the affidavit supporting the search warrant.

the Daily's photographer had been in a position where he could have photographed the assaults. A 34-35.

Officer Peardon obtained a copy of the special edition and on Monday April 12, with the assistance of Deputy District Attorney Brown, prepared a search warrant affidavit. A 27, 33-35, 37, 152-154. The affidavit described the assaults, stated that Peardon had seen a person photographing the assaults and described the photographs published in the Daily's special edition. A 33-35.

Though not mentioned in the search warrant affidavit, Brown had specific reasons, later disclosed in an affidavit opposing summary judgment, for recommending a search warrant rather than a subpoena duces tecum. A 149-154. First, almost all felony prosecutions in California are necessarily (see Argument I. B. *infra*, at 19-20) prosecuted by the complaint-information procedure, and under that procedure no subpoena may issue until a defendant has been identified and a prosecution initiated. Calif. Pen. Code §§ 1326-1327. A 153-154. Second, in a 1969 proceeding that arose out of another demonstration, Brown had sought to obtain photographic evidence from the Daily by means of a subpoena duces tecum. A 149-151. Two staff members had given testimony to the effect that evidence sought by the subpoena had been either misplaced or stolen. A 149-151. Brown then examined "contact sheets" produced by the Daily and concluded "that the contact sheets and/or the films from which they had been produced were incomplete and that a number of photographs, in

[Brown's] opinion those which would have been incriminating, had been deleted." A 150. Third, in policy statements published prior to April 1971, the Daily stated that it felt "no obligation to help in the prosecution of students for crimes related to political activity" and that "negatives which [could] be used to convict protestors [would] be destroyed." A 118, 152-153. For these reasons, Brown was of the opinion that speedy action was required to avoid destruction of crucial evidence and that such action could only be accomplished by means of a search warrant. A 152-154.

When Peardon's affidavit was prepared it was taken before Judge Phelps. A 21-22. Judge Phelps issued a warrant commanding a search of the premises of the Daily for photographs of the April 9 demonstration, negatives of the photographs and any film used in taking the photographs. A 21-22. The defendant officers executed the warrant at approximately 5:50 in the afternoon, searching desk tops, table tops, unlocked drawers,* and other relatively open areas,

*Between the time of the 1969 proceeding and the time of the events that are the basis of this case there were numerous civil disorders in Palo Alto and on the Stanford campus. A 152. Photographic evidence of crimes committed during these disorders had usually been available, without court order, from police photographers or news media other than the Daily. A 152.

*An affidavit of a staff member filed in support of plaintiffs' motion for summary judgment asserted that the Daily's policy of evidence destruction did not apply to material covered by a subpoena; this qualification of the policy had not been contained anywhere in the published statement. A 84, 117-118.

*The police victims were generally not able to identify the persons who assaulted them. A 175, 180.

*There were several locked drawers in the Daily's desks and filing cabinets; these were not opened. A 157, 164.

glancing at materials to determine whether there were pictures, films or negatives concealed among them, but not reading in whole or in part any written material. A 155-169. Materials were, as much as possible, returned to the position in which they were found. A 158, 165, 169. Staff members observing the search did not make any claim of confidentiality for any material. A 158, 161, 165, 168-169. The entire search lasted about fifteen minutes.⁹ A 158, 162, 165, 169. Of the materials described in the warrant, only the published photographs were found; nothing was seized. A 27, 43, 53. See App. Pet. 13.

SUMMARY OF ARGUMENT

The Ninth Circuit's startling holding would require that every search warrant application meet a new additional requirement of showing that the occupant of the target premises is a suspect, i.e., that probable cause exists to believe that the occupant participated in the crime to which the search relates, or, if that showing is not possible, then that there is probable cause to believe that materials may be destroyed or that a subpoena is otherwise impractical.

Precedent precludes the Ninth Circuit's additions to the Fourth Amendment. The warrant in the case at bar complied with the traditional delineation of probable cause and with all other requirements of

⁹The length of the search and whether any material was read were disputed but as the district court's ruling was made on plaintiffs' motion for summary judgment presumably these factual disputes were resolved in defendants' favor. See 6 Moore's Federal Practice, 56.27[1].

the Amendment's warrant clause. The settled meaning of the term probable cause is: cause to believe that specified items relating to criminal activity are at a particular location at a particular time. It means that and only that.

The search warrant is a basic investigative tool essential to effective law enforcement, affording effective protections to the individual, and controlled by prior judicial review. The subpoena is slower, may result in the destruction of evidence either from sympathy or criminal pressure, may issue on mere suspicion, is not subject to prior judicial review, may result in Fifth Amendment problems and generally is not available unless a criminal proceeding is pending.

Where, as here, the Fourth Amendment's established protections are applied with scrupulous exactitude, there is no abridgement of First Amendment freedoms. The search was brief, narrow and orderly. No materials were read and no confidences were claimed or breached. Nothing was seized.

The effect of such a search on the newsgathering function is minimal and is outweighed by the compelling public interest in fair and effective law enforcement. A newsman is not exempt from a general law simply because the law arguably decreases the amount of information the newsman supplies to the public. Probable cause to believe a search will produce photographs that constitute direct evidence of violent crimes and also identify the criminals is a compelling reason for the issuance of a warrant.

The lower courts' failure to consider California's scheme of laws, which afford wider protections than the federal scheme, violated principles of comity. The lower courts incorrectly stated as a major rationale the lack of a vicarious exclusionary rule when in fact California has such a rule.

2. The award of attorneys' fees violates the absolute immunity granted by this Court to judges and prosecutors. The Civil Rights Attorney's Fees Awards Act of 1976 does not abrogate this immunity and cannot be interpreted to subject local governmental entities to the payment of attorneys' fees in section 1983 actions. Any attempt by Congress to impose such liability on judges, prosecutors, those who carry out judicial orders and/or public entities would exceed the permissible scope of section 5 of the Fourteenth Amendment to the United States Constitution.

ARGUMENT

I

THE TRADITIONAL REQUIREMENT THAT SEARCH WARRANTS ISSUE ONLY ON PROBABLE CAUSE TO BELIEVE SEIZABLE ITEMS ARE IN A PARTICULAR PLACE SHOULD NOT BE ENCUMBERED BY AN ADDITIONAL REQUIREMENT OF PROBABLE CAUSE TO BELIEVE THAT THE OCCUPANT PARTICIPATED IN THE CRIME OR WILL NOT HONOR A SUBPOENA DUCES TECUM.

The Ninth Circuit added to the Fourth Amendment's stated requirements, and held that "law enforcement agencies cannot obtain a warrant to conduct a third party search unless the magistrate

has probable cause to believe that a subpoena duces tecum is impractical." App. Pet. 26. A "third party" means, a "nonsuspect" and apparently, under the court's reasoning, every person is presumed to be a nonsuspect unless the warrant application shows probable cause to believe that the person has participated in the crime to which the search relates. Thus, every search warrant application would be required to meet a new additional requirement of showing that the occupant of the target premises is a suspect, i.e., that probable cause exists to believe that the occupant participated in the crime to which the search relates, or, if that showing is not possible, then that there is probable cause to believe that materials may be destroyed or that a subpoena is otherwise impractical.

A. The Third-Party Search Holding Is In Direct Conflict With Precedent.

The Ninth Circuit's third-party holding is a sharp break with history.¹⁰ The term "probable cause" has always been interpreted to mean cause to believe only that "the items sought are in fact seizable by virtue of being connected with criminal activity, and that the items will be found in the place to be searched." Comment, 28 Univ.Chi.L.Rev. 664, 687 (1961).¹¹ Our

¹⁰Already, the Sixth Circuit has rejected the Ninth Circuit's third-party holding. *United States v. Mfrs. National Bank of Detroit, Livernois-Lyndon Street, Safety Deposit Box No. 127, Detroit, Michigan* (6th Cir. 1976) 536 F.2d 699, 702-703, cert. den. 429 U.S. 1039.

¹¹See also *United States v. Ventresca* (1965) 380 U.S. 102; *Amsterdam*, "Perspectives on the Fourth Amendment" 58 Minn. L.Rev. 349, 358 (1974); American Law Institute, "A Model Code of Pre-Arraignment Procedure, section 220.1 (1972).

research has failed to discover a single jurisdiction, state or federal, interpreting "probable cause" as also entailing cause to believe that the occupant either participated in the crime or will not honor a subpoena.¹² The rule has always been that the affidavit "need not identify the person in charge of the premises or name the person in possession or any other person as the offender." *LaFave*, Search and Seizure:

¹²The Ninth Circuit reasoned: (1) *Owens v. Way* (Ga. Sup. Ct. 1914) 141 Ga. 796, 82 S.E. 132, and *Commodity Mfg. Co. v. Moore* (Supp. 1923) 198 N.Y.S. 45, "indicate that search of a third party even with a warrant will not satisfy the requirements of the Fourth Amendment;" (2) in situations involving non-suspects, warrants are unnecessary because of the availability of "less drastic means;" (3) as a historical matter the notion of search warrants has involved only those suspected of crime; (4) *Bacon v. United States* (9th Cir. 1971) 449 F.2d 933 "would seem to compel" the holding; and (5) the exclusionary rule is not available to third parties.

None of these reasons has validity: (1) *Owens* refers to an arrest warrant rather than a search warrant (82 S.E. at 133); the language relied on from *Commodity*, while referring to a search warrant, is dictum (198 N.Y.S. at 47); and the property rationale of these cases is no longer applicable (*Warden v. Hayden* (1967) 397 U.S. 294); (2) the subpoena alternative advanced as a "less drastic means" will not achieve the same ends as a warrant; (3) the statement that search warrants have historically been used only against suspects is simply in error; see Argument I.E., *infra*; (4) the *Bacon* case dealt only with statutory rules applicable to arrest warrants for material witnesses; see 449 F.2d at 943; (5) California has a "vicarious exclusionary rule" permitting a defendant to challenge evidence obtained from the search of a third party, including a nonsuspect and, thus deterring improper third party searches (*Kaplan v. Superior Court* (1971) 6 Cal.3d 150, 98 Cal.Rptr. 649).

Even where the exclusionary rule does not apply to third party searches, impropriety in those searches can be easily deterred. A knowing deception of the magistrate or a knowing excess in the execution of a search will subject the offending police officer to an action for return of the property and for damages. Whatever may have been the reluctance in the past to institute such actions, they are nowadays commonplace.

"The Course of True Law . . . Has Not Run . . . Smooth." U.Ill.L.F. 255, 261 (1966). See also, for example, Federal Rules of Criminal Procedure, Rule 41; California Penal Code sections 1528, 1529. *Hanger v. United States* (8th Cir. 1968) 398 F.2d 91.

There is no dispute that Officer Peardon's affidavit established probable cause to believe that items related to criminal activity would be found on the Daily's premises. The crimes were photographed from close range and published photographs showed this photography probably was performed by the Daily's photographer. There is also no dispute that the warrant's description of the Daily's premises and the photographic materials sought were sufficient to meet the particularity requirements of the Fourth Amendment.

The formal requirements of the warrant clause are the primary means for attending to the evil at which the Amendment was aimed, i.e., these protections preclude the general warrant. See *Johnson v. United States* (1948) 333 U.S. 10, 13-14; see also *Davis v. United States* (1946) 328 U.S. 582, 604-605, Frankfurter, J., dissenting. It is ancient learning that compliance with the warrant clause is compliance with the Amendment: "Whatever else may have been the intent of the forefathers in drafting the first clause of the amendment, it would appear that searches conducted pursuant to the warrant provisions of the second clause fulfill the requirements of reasonable-

ness." Comment, 28 Univ. of Chi.L.Rev. 664, 687 (1961).¹³

B. The Ninth Circuit's Holding Would Harm the Public's Interest In Fair and Effective Law Enforcement and Diminish Present Protections to the Individual.

It has always been recognized that once the Fourth Amendment's established requirements have been met, the public right is paramount.

"This Court is equally concerned to uphold the actions of law enforcement officers consistently following the proper constitutional course . . . [T]he officers in this case did what the constitution requires. They obtained a warrant from a judicial officer 'upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the . . . things to be seized.' It is vital that having done so their actions should be sustained under a system of justice responsive both to the needs of individual liberty and to the rights of the community." *United States v. Ventresca* (1965) 380 U.S. 102, 111-112.

The effectiveness of the search warrant depends upon its being promptly obtained and executed: The warrant "is generally issued in situations demanding prompt action." *Fuentes v. Shevin* (1972) 407 U.S. 67, 93 n. 30. Indeed, the Ninth Circuit has itself recognized that "it is . . . necessary that search war-

¹³Though there has been debate about the relationship between the Amendment's two clauses, that debate has dealt with the extent to which the reasonableness clause permits exceptions to the warrant clause. See e.g., *Davis v. United States*, *supra*, 328 U.S. at 609-610, Frankfurter, J., dissenting.

rants be executed with some promptness in order to lessen the possibility that the facts upon which probable cause was initially based do not become dissipated." *United States v. Nepstead* (9th Cir. 1970) 424 F.2d 269, 271. In contrast, the Ninth Circuit's new rule would necessarily slow the warrant procedure: Additional information would be required for *every search warrant application*. Subpoenas, proposed as a substitute, have always been slow: They entail notice and opportunity to challenge.

The Ninth Circuit's subpoena is not a viable substitute for a warrant for another reason. A warrant is issued *ex parte* "to avoid giving warning to those in control of the place to be searched." *American Law Institute, A Model Code of Pre-Arrest Procedure*, Note, section 220.1 (1972). A subpoena is a warning that the criminal evidence is wanted. The Ninth Circuit assumes that if probable cause to arrest cannot be shown then the person who has control of criminal evidence, after receiving this warning, can generally be trusted to preserve that evidence. This assumption is not sound. First, there will be many instances where, though probable cause to arrest cannot be shown, the apparent non-suspect is in fact the criminal. "The danger is all too obvious that a criminal will destroy or hide evidence or fruits of his crime if given any prior notice." (*Fuentes* at 93 n. 30). Second, regardless of whether the possessor is a criminal he may destroy or dispose of the evidence. In many cases he will have obtained the evidence because he is sympathetic to the criminal;

this sympathy will produce a strong temptation to dispose of the evidence. In this case, for instance, the plaintiffs had a stated public policy of destroying criminal evidence in "political cases." Perhaps more often the person will not give the evidence to the government for fear of criminal reprisal.

Ironically, the Ninth Circuit's rule is also troublesome because, in several respects, the subpoena is less protective of the individual than is the search warrant. Though the Fourth Amendment guards against overbreadth in subpoenas (*Fisher v. United States* (1976) 425 U.S. 391, 401) the probable cause and particularity requirements are much less stringent. For example, probable cause is satisfied by a determination that the investigation is authorized by Congress. *Oklahoma Press Publishing Co. v. Walling* (1946) 327 U.S. 186, 209. An investigation justifying issuance of a grand jury subpoena "may be triggered by tips, rumors, evidence proffered by the prosecutor, or the personal knowledge of the grand jurors." *Branzburg v. Hayes* (1972) 408 U.S. 665, 701-702. The particularity requirements come down to a requirement that the specification of documents be adequate and not excessive; location need not be specified. *Oklahoma Press, supra* at 209. By contrast a warrant issues only when there is probable cause to believe particularly described seizable items are in a particularly described place. *United States v. Miller* (1976) 425 U.S. 435, 446 n. 8.

In addition, the subpoena process omits all the protections inherent in prior judicial review. *Man-*

cus v. De Forte (1968) 392 U.S. 364, 371. Once a formal proceeding has been started, subpoenas are issued by clerks signed in blank in batches. Persons unsophisticated in the law are likely to produce subpoenaed property without even knowing that any review is available. Where the third party is knowledgeable in the law, compliance with the subpoena may seem politic, thus destroying any claimed expectation of privacy which the depositor might have in the items sought, *Cf. United States v. Miller* (1976) 425 U.S. 436, 455 (Marshall, J., dissenting).

Use of a subpoena where the criminal status of the "third party" is unclear would also raise concerns under the rule that "the Fifth Amendment may protect an individual from complying with a subpoena for the production of his personal records in his possession because the very act of production may constitute a compulsory authentication of incriminating information. . . ." *Andresen v. Maryland* (1976) 427 U.S. 463, 473-474.

Finally, a subpoena is not available to district attorneys in the absence of a pending judicial proceeding.¹⁴ The Ninth Circuit brushed aside Brown's affidavit to the effect that a subpoena duces tecum was impractical as a matter of California law by commenting that the county grand jury, a body authorized to issue subpoenas, had met shortly after the search. This comment fails to recognize that, with exceptions not here pertinent, California law autho-

¹⁴But see 1974 California Judicial Council Report, 64 fn. 175 noting that Vermont does permit states' attorneys to subpoena.

rizes only one grand jury per county and requires that grand jury to spend a majority of its time on civil matters. Little time is left for criminal matters and criminal investigations as understood in the federal system are practically unknown. Thus, in 1972 only 3.8 percent of California's felony prosecutions were initiated by way of the grand jury. 1974 California Judicial Council Report, 30.

C. Established Fourth Amendment Protections Are Applied With Scrupulous Exactitude in First Amendment Cases and Were So Applied in This Case.

The Ninth Circuit states that, on being asked to issue a search warrant "the magistrate should consider . . . whether First Amendment interests are involved." App. Pet. 28.¹⁵ We agree. But we do not agree that a radical change in the law is necessary to govern newspaper searches.

Established law applies Fourth Amendment protections with a "most scrupulous exactitude" whenever a search touches on First Amendment interests. *Stan-*

¹⁵While the Ninth Circuit treats the broad third-party holding as dispositive, the court also sets out a second ruling as applicable to searches of newspapers: "A search warrant should be permitted only in the rare circumstance where there is a *clear showing* that (1) important materials will be destroyed or removed from the jurisdiction; and (2) a restraining order would be futile." App. Pet. 32-33. Court's own emphasis.

But then, the Ninth Circuit ruled that Brown's information regarding the Daily's policy of evidence destruction could not be considered as a showing of subpoena impracticality because the information had not been contained "within the four corners of the affidavit." The Court went on to say that even had this information been set forth in the affidavit it would have been insufficient. This sets extremely stringent requirements for the showing of subpoena impracticality. See App. Pet. 33 n.16 and pp. 27-28.

ford v. Texas (1965) 379 U.S. 476, 485. This is also the California rule. *Aday v. Superior Court* (1961) 55 Cal.2d 789, 797-98, 13 Cal.Rptr. 415, 420; Witkin, California Evidence 2d, §123. The particularity requirements of the warrant clause are so applied that "nothing is left to the discretion of the officer executing the warrant." *Marron v. United States* (1927) 275 U.S. 192, 196. Thus, when the policeman executes the warrant he is strictly limited by its terms. Even though there are items in plain view that he might seize were they named in the warrant the First Amendment may prevent such seizure. See *Roaden v. Kentucky* (1973) 413 U.S. 496; *Fisler v. Superior Court* (1974) 38 Cal.App.3d 475, 481, 113 Cal.Rptr. 285, 289. If there is a seizure, the First Amendment may require opportunity for a prompt adversary hearing. *United States v. Thirty-Seven (37) Photographs* (1971) 402 U.S. 363.

The defendants in this case complied with the rule of scrupulous exactitude: the warrant named only photographs tending to depict violent criminal acts. The search was brief and narrow: items were replaced in their positions; no materials were read; no confidentiality was claimed; no evidence worthy of consideration justifies a conclusion that confidences were actually breached. Nothing was seized.

D. When the Application Of Established Protections Is Scrupulously Exact The Effect Of A Search On The Newsgathering Function Is Minimal And Is Outweighed By The Compelling Public Interest In Fair And Effective Law Enforcement.

Although "newsgathering is not without its First Amendment protections" (*Branzburg v. Hayes* (1972) 408 U.S. 665, 707),¹⁶ the First Amendment is not violated by every restriction that might conceivably decrease the amount of information flowing to the public. See *Zemel v. Rusk* (1965) 381 U.S. 1, 16-17. "[O]therwise valid laws serving substantial public interests may be enforced against the press as against others, despite the possible burden that may be imposed." *Branzburg v. Hayes*, *supra* at 683.

The laws of libel may subject a newsman to money damages for the circulation of knowing or reckless falsehoods damaging to private reputation (see *New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 279-280; *Branzburg* at 684-685); the laws of conversion may require a newsman to pay compensation if he televises the entire act of a performer (*Zacchini v. Scripps-Howard Broadcasting Company* (1977) ____ U.S. ____ No. 76-577, 45 L.W. 4954); and a newsman is restricted by the copyright laws as is any other citizen. See *United States v. Bodin*, 375 F. Supp. 1265, 1267 (W.D. Okla. 1974); *Zacchini*, *supra*

¹⁶Newsgathering helps to provide the public with information necessary for self-government. See *Pell v. Procunier* (1974) 417 U.S. 817, 835, Powell, J., dissenting.

The provisions for freedom of speech and press may have been intended not so much to protect a newsman's right to express as to protect the voter's right to hear all views on questions of public importance. See A. Meiklejohn, *Free Speech And Its Relation to Self-Government* 24-25, (1948).

45 L.W. at 4958 n. 13. Press access to prison inmates is, in general, not constitutionally superior to that of the public (*Pell v. Procunier* (1974) 417 U.S. 817; *Saxbe v. Washington Post Co.* (1974) 417 U.S. 843); and, enforcement of the fair trial guarantee for criminal defendants may deny the press information of dramatic public interest. *Shepherd v. Maxwell* (1966) 384 U.S. 333. Newspapers are not constitutionally exempt from the National Labor Relations Act (*Associated Press v. NLRB* (1937) 301 U.S. 103, 132-133), the Sherman Act (*Associated Press v. United States* (1945) 326 U.S. 1), or non-discriminatory forms of general taxation (*Grosjean v. American Press Co.* (1936) 297 U.S. 233, 250).

That newspapers may also be subjected to the general laws of criminal investigation is illustrated by *Branzburg v. Hayes*, *supra*: "Insofar as any reporter in these cases undertook not to reveal or testify about the crime he witnessed, his claim of privilege under the First Amendment presents no substantial question." *Branzburg v. Hayes*, *supra*, 408 U.S. at 692. The search warrant in this case was based on probable cause to believe that the "Daily" possessed photographs of persons engaging in the commission of serious, violent felonies. There is no basis for any special First Amendment claim as to this type of evidence.¹⁷

When a warrant issues only in circumstances as compelling as these; when its scope is as narrow as

¹⁷See also *Caldero v. Tribune Publishing Co.* ____ U.S. ____ (1977) 98 Idaho 288, 562 P.2d 791; cert. den. October 31, 1977 [76-1848; 46 L.W. 3288].

this one; and when the search is narrow, brief and orderly, there is no danger that searches pursuant to warrant will significantly affect the flow of news to the public.

E. The Lower Courts' Failure to Consider California's Scheme of Laws Violated Principles of Comity.

The issuance of search warrants directed against premises of nonsuspects has long been authorized by California Penal Code section 1524.¹⁸ Section 1524 was forcefully called to the attention of the two lower courts; but nowhere in the courts' opinions is there a mention of section 1524.

As opposed to this, a key rationale of the opinions is that nonsuspects will not be protected because of the absence of a vicarious exclusionary rule—this is plain error insofar as California is concerned. California has a vicarious exclusionary rule. *Kaplan v. Superior Court* (1971) 6 Cal.3d 150, 98 Cal.Rptr. 649.¹⁹ In addition, the lower federal courts refused to

¹⁸The history of section 1524 makes it clear that it is intended to authorize searches of any and all premises on probable cause even though the premises are those of a "third-party nonsuspect." See for example 32 Cal. State Bar Jour. 615, 616 (1957); Calif. Stats. 1899, c. 72, p. 87, section 1; Calif. Stats. 1957, c. 1884, p. 3289, section 1. Moreover, the California Legislature recently affirmed the use of search warrants for premises of financial institutions—which, of course may be considered as falling under the "nonsuspect" label. See Calif. Gov. Code sections 7470(a)(3), 7475; "California Right To Financial Privacy Act" Calif. Stats. 1976, c. 1320.

¹⁹In addition to its employment of the vicarious exclusionary rule, California does more than the federal constitution requires through, for example, its prohibition of full field searches on traffic arrests (*People v. Brisendine* (1975) 13 Cal.3d 528, 546, 119 Cal.Rptr. 315, 326; contrast *United States v. Robinson* (1973) 414 U.S. 218 and *Gustafson v. Florida* (1973) 414 U.S.

consider the general unavailability of subpoenas to law enforcement agencies.

The refusal to consider California's laws and the reliance on a rationale inapplicable to California is a clear violation of comity. Comity entails "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." See *Younger v. Harris* (1971) 401 U.S. 37, 44. See also *Stone v. Powell* (1976) 428 U.S. 465, 491 n.31; *Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 259, Powell, J., concurring.

Because the Ninth Circuit gave no consideration to California's scheme of laws, the state is now faced

260); its prohibition of routine inventory of impounded autos (*Mozzetti v. Superior Court* (1971) 4 Cal.3d 699, 94 Cal.Rptr. 412; contrast *South Dakota v. Opperman* (1973) 428 U.S. 364), and, perhaps, a more expansive view of the types of circumstances that give rise to a reasonable expectation of privacy. See *Burrows v. Superior Court* (1974) 13 Cal.3d 238, 118 Cal.Rptr. 166; *United States v. Miller* (1976) 425 U.S. 436, 441, Brennan, J., dissenting. See also Falk, "The State Constitution: A More Than 'Adequate' Nonfederal Ground" (1973) 61 Cal.L.Rev. 273, 277 n.16.

California also has a shield statute which at the time this action was brought protected newsmen from compulsory disclosure of sources. California Evidence Code section 1070; Calif. Stats. 1965; ch. 299; section 1070. This statute has since been amended to protect newsmen from compulsory disclosure of unpublished materials including photographs. But California case law indicates that section 1070 would not shield a newsman from "testifying about criminal activity in which they have participated or which they have observed. . . ." *Rosato v. Superior Court* (1975) 51 Cal.App.3d 190, 218, 124 Cal.Rptr. 427, 446.

with a frankly experimental ruling that would require major adjustments in its administration of the criminal justice system. Lower federal courts should be directed to confine such experiments, we submit, to federal enclaves. *Compare Stone v. Powell, supra; Schneekloth v. Bustamonte, supra; U.S. ex rel. Lawrence v. Woods*, 432 F.2d 1072, 1075-1076 (7th Cir. 1970).

II

THE AWARD OF ATTORNEYS' FEES VIOLATES THE ABSOLUTE IMMUNITY FROM MONETARY PENALTIES GRANTED TO JUDGES, PROSECUTORS AND THOSE WHO CARRY OUT JUDICIAL ORDERS. THE CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976 DOES NOT ABROGATE THIS ABSOLUTE IMMUNITY. ANY ATTEMPT TO DO SO BY CONGRESS WOULD EXCEED THE PERMISSIBLE SCOPE OF SECTION FIVE OF THE FOURTEENTH AMENDMENT.

A. Judges' and Prosecutors' Absolute Immunity from Monetary Penalties Precludes the Imposition of Attorneys' Fees.

The Ninth Circuit acknowledged that *Alyeska Pipeline Service Co. v. The Wilderness Society* (1975) 421 U.S. 240 "destroyed the legal foundation for [plaintiffs'] fee award." App. Pet. 4. Nonetheless, the Circuit Court applied the provisions of the Civil Rights Attorney's Fees Awards Act of 1976, Public Law No. 94-559, 90 Stat. 2640 (October 19, 1976) (hereinafter "the Act"), which states, *inter alia*:

"In any action or proceeding to enforce a provision of sections . . . 1979 [42 U.S.C. § 1983] . . . of the Revised Statutes, . . . the Court, in its discretion, may allow the prevailing party

other than the United States, a reasonable attorney's fee as part of the cost."

This statute cannot be applied in this case without abrogating the absolute immunity from monetary penalties afforded to judges, prosecutors and those who carry out judicial orders.²⁰

There is little doubt that the magistrate who issued the warrant was the prime actor and therefore the responsible party in this lawsuit. But for his act of signing the warrant, the basis for the instant case would never have existed. If the Act is to apply to anyone, it must apply to the magistrate who by his act sanctioned what the Ninth Circuit concluded was an invasion of the plaintiffs' constitutional rights. Consequently, though the magistrate was dismissed as a party at plaintiffs' request, affirming the Ninth Circuit's opinion would acknowledge a decision that attorneys' fees can be awarded against a prosecutor for essentially a judicial act. It would inevitably lead to the imposition of attorneys' fees against a magistrate or any judge named in an injunctive or a declaratory relief action. In order to preserve the independence of the judiciary, the absolute immunity

²⁰In any event, the Act cannot be applied retroactively, since the impact of personal liability for attorneys' fees will have a disastrous impact on the absolute immunity conferred upon judges and prosecutors and significantly affect the police officers who are duty-bound to carry out a judicial order. Retroactive application of the Act would therefore result in manifest injustice. *Bradley v. The School Board of the City of Richmond* (1974) 416 U.S. 696, 717-718. We also submit that retroactive application of the Act would result in a denial of due process, as no notice has been afforded defendants that decisions made years ago can now be the basis for personal financial liability.

shielding judges from the imposition of monetary penalties compels the conclusion that judges cannot be personally liable for the imposition of attorneys' fees. See *Pierson v. Ray* (1967) 386 U.S. 547.

It is likewise evident that the absolute immunity granted by this Court to prosecutors from monetary penalties in *Imbler v. Pachtman* (1976) 424 U.S. 409 should not be destroyed by the imposition of attorneys' fees. In *Imbler*, this Court denied plaintiff's request for \$2.7 million in actual and exemplary damages and \$15,000 attorneys' fees, concluding that the prosecutor enjoys "the same absolute immunity under section 1983 that the prosecutor enjoys at common law" (424 U.S. at 427), because:

- (1) "The public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages." 424 U.S. at 424-425.
- (2) "[I]f the prosecutor could be made to answer in court each time . . . [a defendant] charged him with wrongdoing, his energy and attention would be diverted from the pressing duty of enforcing the criminal law." 424 U.S. at 425.
- (3) "Frequently acting under serious constraints of time and even information, a prosecutor inevitably makes many decisions that could engender colorful claims of constitutional deprivation. Defending these decisions, years after they were made, could impose unique and intolerable burdens upon a prosecutor responsible annually for hun-

dreds of indictments and trials." 424 U.S. at 425-426.

- (4) "If prosecutors were hampered in exercising their judgment as to the use of . . . [doubtful] witnesses by concern about resulting personal liability, the triers of fact would be denied relevant evidence." 424 U.S. at 426.
- (5) "The ultimate fairness of the operation of the system itself could be weakened . . . by even the subconscious knowledge that a post-trial decision in favor of the accused might result in the prosecutor's being called upon to respond in damages for his error or mistaken judgment." 424 U.S. at 427.

Precisely the same principles preclude the award of attorneys' fees in this case. The constant threat of personal financial liability for attorneys' fees is just as inhibiting as the possibility of a damage award. Labeling the financial imposition "award of attorneys' fees" does not alter either the reality or the burden. In each case the prosecutor is subject to substantial pecuniary liability which will detrimentally affect the decision-making process and divert the prosecutor from the duties of enforcing the criminal law. Moreover, imposing personal liability on a prosecutor who secures a search warrant from a magistrate will result in a chilling effect on his diligent search for relevant evidence. No clearer case can be presented than the instant one, where over \$47,000 in attorneys' fees has been awarded, though

the case has not gone to trial and no formal discovery has been commenced.²¹

B. The Act Does Not Abrogate the Absolute Immunity Afforded to Judges, Prosecutors, and Those Who Carry Out Judicial Orders.

Significantly, the language of the Act itself does not specifically state that Congress intended to abrogate judicial and/or prosecutorial immunity. In fact, the legislative history of the Act appears to recognize the continued existence of the individual personal immunities. As stated by the Senate Judiciary Committee:

"... defendants ... are often State or local bodies or State or local officials. In such cases it is intended that the attorneys' fees, like other items of costs, will be collected *either* directly from the official, in his official capacity, from funds of his agency or under his control, *or* from the State or local government (whether or not the agency or government is a named party)." (Senate Rep. No. 94-1011, 94th Congress, 2d Session 5 (1976)). (Emphasis added.)

²¹The reasons underlying the damages immunity of *Imbler v. Pachtman*, *supra*, also support an immunity against declaratory and/or injunctive actions for prosecutors and those who carry out judicial orders, at least when, as here, they participate in the good faith exercise of judicial functions. There is authority for the proposition that judges are immune from any declaratory or injunctive relief. *Atchley v. Greenhill* (S.D. Tex. 1974) 373 F.Supp. 512, 514, *affirmed*, 517 F.2d 692, *cert. denied*, 424 U.S. 915. See also, *Hill v. McClennan* (5th Cir. 1974) 490 F.2d 859; *Mirin v. Justices of Supreme Court of Nevada* (D. Nev. 1976) 415 F.Supp. 1178, 1192. *Contra, United States v. McLeod* (5th Cir. 1974) 385 F.2d 734. As the good faith of Bergna, Brown and the police has never been challenged, and as they were clearly participating in the exercise of a judicial function, no cause of action has been stated.

The fact that the Senate Judiciary attempted to impose the financial burden either on his department or the governmental entity of which the agency is a component, rather than on individual defendants, evidences a realization of their continuing immunity.

C. The Act Cannot Be Interpreted to Subject Local Governmental Entities to the Payment of Attorneys' Fees in Section 1983 Actions.

The above-quoted language from the Report of the Senate Judiciary Committee, it is argued, evidences an intent on the part of the Committee to impose on local public entities the burden of paying attorneys' fees, notwithstanding the fact that the public entities are not parties to the action.²²

This argument ignores the fact that there is no "threshold ... congressional authorization" (*Fitzpatrick v. Bitzer* (1976) 427 U.S. 445, 452) which allows a section 1983 suit to be brought against a local entity. The statute does not attempt to amend the language of section 1983 to provide that municipalities be liable under the Act and thus legislatively overrule this Court's decisions that state and local government entities are not "persons" within the

²²Similar, though less direct, language appears in the House Report: "The greater resources available to governments provide an ample basis from which fees can be awarded to the prevailing plaintiff in suits against governmental officials or entities." Footnote 14 states: "Of course, the 11th Amendment is not a bar to the awarding of counsel fees against state governments. (*Fitzpatrick v. Bitzer*, ____ U.S. ____, 96 S.Ct. 2666 (June 28, 1976).") Report of the House of Representatives Committee on the Judiciary, *supra*, at 7.

The question of the Act's applicability to a state is presently before this Court in *Hutto v. Finney, et al.*, No. 76-1660. See 46 L.W. 3093, 3621.

meaning of section 1983. *Monroe v. Pape* (1961) 365 U.S. 167; *Moor v. Alameda* (1973) 411 U.S. 693. From this it is clear that even though some Committee members may well have thought to provide for the payment of fees from municipal treasuries, they did not achieve that objective. The language used in the Act as finally passed does not manifest any intent to overrule this Court. Members of Congress are aware of this deficiency. Recently introduced legislation would amend Title 42, United States Code, section 1983, and specifically include units of government within the definition "person." H.R. 4514, introduced March 4, 1977.

Both the trial court and plaintiffs have attempted to avoid this argument by noting that the public entity would pay any fees pursuant to California's indemnity statute. (Govt. Code § 825.)²³ The fact that a state chooses to indemnify its employees does not confer jurisdiction on a federal court. Federal jurisdiction does not rest in the state legislature. A lower federal court cannot do indirectly what this Court has ruled it cannot do directly. As stated by this Court in *Moor v. Alameda, supra*, at 709-710:

"To save the Act [section 1983], the proposal for municipal liability was given up. It may be that even in 1871 municipalities which were sub-

²³It is noteworthy that the Ninth Circuit has held that the California Tort Claims Act and its procedural requirements have no application to a federal civil rights action. *Willis v. Reddin* (9th Cir. 1969) 418 F.2d 702, 705. It would clearly be inconsistent to hold that one can bring suit in federal court without fulfilling the requirements of the Tort Claims Act and at the same time cite a provision of that very act in an attempt to bootstrap an award of attorneys' fees against a public entity.

ject to suit under state law did not pose in the minds of the legislators the constitutional problems that caused the defeat of the proposal. Yet nevertheless the proposal was rejected *in toto*, and from this action we cannot infer any congressional intent other than to exclude all municipalities—regardless of whether or not their immunity has been lifted by state law—from the civil liability created in the Act of April 20, 1871, and § 1983. Thus, § 1983 is unavailable to these petitioners insofar as they seek to sue the County." (Footnotes omitted) (Emphasis added.) See also *Monroe v. Pape, supra*, 365 U.S. 167.

D. Any Congressional Attempt to Abrogate the Absolute Immunity Afforded Judges, Prosecutors and Those Who Carry Out Judicial Orders Would Exceed the Permissible Scope of the Fourteenth Amendment to the United States Constitution.

Section 5 of the Fourteenth Amendment states: "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." (Emphasis added.)

Defendants submit that any legislation which renders judges, prosecutors and those who carry out judicial orders liable to the personal imposition of attorneys' fees is not "appropriate legislation." This Court's decisions in *Pierson v. Ray* (1967) 386 U.S. 547 and *Imbler v. Pachtman, supra*, 424 U.S. 409, recognize that in order to preserve the independence of the judiciary and the effectiveness of a prosecutor, it is necessary to prohibit any damage action under Section 1983, regardless of the underlying merits. Any other conclusion would render the police power of

the states meaningless, as the leaders of the states' judicial and law enforcement system would be burdened by the constant threat of personal financial liability.

The investigation of crime and the gathering of relevant evidence is the core of the state's police power. When that investigation discloses the probability that evidence will be found in a particular place, a magistrate, in furtherance of the police power, issues a search warrant and orders officers to carry out the search. Subjecting judges, prosecutors and those who carry out judicial orders to the constant threat of monetary liability whenever they perform an official duty subjects the state to an unnecessary and excessive invasion of the police power.²⁴

In our federalist system, "there is a sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in a way that will not unduly interfere with the legitimate activities of the States." *Younger v. Harris* (1971) 401 U.S. 37, 44. No state interest requires more protection from undue Congressional interference than a state's law enforcement system. If Section 5 of the Fourteenth Amendment grants Con-

²⁴In a similar context, this Court has recognized that the legislative, judicial and executive powers should remain separate and independent. *Myers v. United States* (1926) 272 U.S. 52, 116. Congressional imposition of attorneys' fees on a state's judicial and executive officials unnecessarily jeopardizes this independence.

gress such unbridled and non-reviewable power, a state's right to administer its judicial and criminal justice systems have been greatly eroded, and the existence of federalism will depend solely upon Congressional majority rule.²⁵

CONCLUSION

Petitioners respectfully request that the judgment of the Court of Appeals be reversed.

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²⁵It would be equally inappropriate for Congress to achieve the same result indirectly by placing the financial burden upon public entities.

Supreme Court, U. S.
FILED

DEC 17 1977

MICHAEL RODAK, JR., CLERK

**In the Supreme Court of the
United States**

OCTOBER TERM, 1977

Nos. 76-1484, 76-1600

JAMES ZURCHER, et al.,
Petitioners,

vs.

THE STANFORD DAILY, et al.,
Respondents.

LOUIS P. BERGNA, et al.,
Petitioners,

vs.

THE STANFORD DAILY, et al.,
Respondents.

**On Writs of Certiorari to the
United States Court of Appeals for the Ninth Circuit**

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In the Supreme Court of the United States

OCTOBER TERM, 1977

Nos. 76-1484, 76-1600

JAMES ZURCHER, et al.,
Petitioners,

vs.

THE STANFORD DAILY, et al.,
Respondents.

LOUIS P. BERGNA, et al.,
Petitioners,

vs.

THE STANFORD DAILY, et al.,
Respondents.

On Writs of Certiorari to the
United States Court of Appeals for the Ninth Circuit

Brief for Respondents

QUESTIONS PRESENTED

1. In the circumstances of this case, did the search of a newspaper office, pursuant to a search warrant seeking photographs taken in the regular course of journalistic activities, violate the First and Fourth Amendments, where

(a) the purpose of the search was to obtain evidence for use in a criminal prosecution against unrelated persons, and

(b) the affidavit presented to the magistrate made no attempt, and therefore failed, to establish probable cause to believe that

(i) the newspaper or any person employed by it had committed a crime, (ii) contraband or instrumentalities of crime were located on the premises, or (iii) it would be impractical to obtain the evidence sought by subpoena duces tecum?

2. In the circumstances of this case, is declaratory relief against police officers under 42 U.S.C. § 1983 barred unless there is a showing that their unconstitutional actions were taken in bad faith? (Raised only in *Zurcher*, No. 76-1484).

3. Does the Civil Rights Attorney's Fees Awards Act (90 Stat. 2640, 42 U.S.C. § 1988, last sentence)

(a) apply to cases pending at the time of its enactment?

(b) authorize the award of attorneys' fees in cases in which the defendants enjoy an absolute or qualified immunity from the imposition of money damages?

STATEMENT OF THE CASE

This case concerns a search of the offices of *The Stanford Daily*, a student-published newspaper at Stanford University, conducted by Petitioners pursuant to a search warrant. App. 31-32. The purpose of the search was to locate and seize certain photographs believed to be in the *Daily's* unpublished photograph files. App. 21-25. It is undisputed that, at the time of the search, Petitioners had no cause to believe that anyone connected with the *Daily* was involved in unlawful activity, that unlawful activity was being conducted at the *Daily's* offices, or that contraband was being stored there. See 353 F.Supp., at 127, Petition, App. "C", at 12.

On Monday, April 12, 1971, at approximately 5:45 p.m., four police officers appeared at the offices of the *Daily* and, pursuant to the warrant, proceeded to search its offices. App. 162-69. During the course of the search, the officers examined filing cabinets, the contents of desks, shelves and wastebaskets. App. 74 at ¶ 15; App. 130-32, at ¶¶ 2-5. The desks contained, and thus

the officers were in a position to see, notes taken by reporters in the course of interviews conducted for the purposes of gathering news, some of which contained information given in confidence and on the express understanding that the name of the source would not be disclosed. App. 88, at ¶ 25; App. 132, at ¶ 6. The officers were in a position to see and examine business and personal correspondence of the *Daily* and members of its staff. App. 74-75, at ¶¶ 20-21; App. 132, at ¶ 5; App. 140-41. The officers now maintain that none was actually read, and the courts below did not find it necessary to determine the truth of that assertion, although there was evidence to the contrary. App. 74-75, at ¶¶ 20-21; App. 140-41. The search did not locate the photographs sought, and no materials were seized. 353 F.Supp., at 127; Petition, App. "C", at 13.

Uncontroverted affidavits presented to the District Court established the adverse impact that this search had on the *Daily's* ability to gather news. In addition, affidavits of experienced and prominent journalists from around the country demonstrated the profoundly chilling effect which such a search would have on the ability of a journalistic organization to carry out its functions. These are more fully described in Part I, *infra*, at pp. 18-24. In summary, they established that (1) such a search totally disrupts the news gathering and disseminating activities of a paper; (2) to the extent confidential material is revealed (or even perceived by others to be vulnerable to such disclosure), vital sources of news will be impaired and access to events will be blocked; (3) materials *not* the object of the search—some of which may be highly confidential—are subjected to entirely unnecessary exposure despite the lack of *any* governmental interest in such inspection; (4) unlike the issuance of a subpoena, the *ex parte* issuance and execution of a search warrant deprives the newspaper of an opportunity for judicial review and control; (5) such a search

jeopardizes the newspaper's credibility; and (6) such a search creates a substantial risk of self-censorship.

Upon this record, the District Court granted Respondents' Motion for Summary Judgment. It held that the Fourth Amendment—considered in light of the especially stringent standards required for searches which threaten First Amendment interests—rendered unlawful Petitioners' search of *The Stanford Daily* offices. The District Court wrote:

"[T]he Court holds that third parties [not suspected of a crime] are entitled to greater protection, particularly when First Amendment interests are involved. It is the Court's belief that unless the Magistrate has before him a sworn affidavit establishing proper cause to believe that the materials in question will be destroyed, or that a subpoena duces tecum is otherwise "impractical", a search of a third party for materials in his possession is unreasonable per se, and therefore violative of the Fourth Amendment." (353 F.Supp., at 127, Petition, App. "C", at 14).

The District Court's reason for applying especially stringent Fourth Amendment standards to the search involved in the present case appears in subsequent portions of the District Court's opinion:

"The other aspect of defendants' argument—that newspapers, reporters and photographers have no greater Fourth Amendment protection than other citizens—is also without merit. The First Amendment is *not* superfluous. Numerous cases have held that the First Amendment 'modifies' the Fourth Amendment to the extent that extra protections may be required when First Amendment interests are involved. See, e.g., *A Quantity of Books v. Kansas*, 378 U.S. 205, 84 S.Ct. 1723, 12 L. Ed.2d 809 (1964); *Marcus v. Search Warrants*, 367 U.S. 717, 81 S.Ct. 1708, 6 L.Ed.2d 1127 (1961); *Demich, Inc. v. Ferdon*, 426 F.2d 643 (9th Cir. 1960), *vacated and remanded on other grounds*, 401 U.S. 990, 91 S.Ct. 1223, 28 L.Ed.2d 528 (1971); *Bethview Amusement*

Corp. v. Cabn, 416 F.2d 410 (2nd Cir. 1969), *cert. denied*, 397 U.S. 920, 90 S.Ct. 929, 25 L.Ed.2d 101 (1970). See also *NAACP v. Alabama*, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958)." (353 F.Supp., at 134, Petition, App. "C", at 30-31).

Therefore, the District Court concluded:

"[L]aw enforcement agencies cannot obtain a warrant to conduct a third-party search unless the magistrate has probable cause to believe that a subpoena duces tecum is impractical. Any evidence that a subpoena is impractical must be presented in a sworn affidavit if the magistrate is to rely on it. [citation] In other words, even if facts and circumstances do exist that establish probable cause to believe a subpoena is impractical, they must be set forth in a sworn affidavit or else the warrant is defective." (353 F.Supp., at 132; Petition, App. "C", at 26-27).

The District Court recognized that circumstances could arise in which the use of a subpoena duces tecum would be impractical. For example, it noted that while a "court certainly possesses the power to issue a restraining order where it is presented with evidence that the materials are about to be taken from the jurisdiction or their destruction is imminent," a warrant may issue where "it appears that the materials will be destroyed or removed from the jurisdiction despite the restraining order." *Id.*, at 133; Petition, App. "C", at 27-28. But in this case no evidence of impracticality or threat of destruction was presented to the magistrate. *Id.*¹

1. Petitioners state that "[t]hough not mentioned in the search warrant affidavit, Brown had specific reasons . . . for recommending a search warrant rather than a subpoena duces tecum." Zurcher Brief, at 8. They state that in 1969, certain photographs subpoenaed from the *Daily* were improperly withheld and that it was the announced policy of the *Daily* to destroy negatives. The courts below properly ruled that allegations of this kind, which were not presented to the magistrate, could not validate an otherwise defective warrant. 353 F.Supp., at 135 n.16; Petition, App. "C", at 33. [footnote 1, continued]

At the time of its original decision on the merits, the District Court declined to enjoin similar future searches by Petitioners, expressing its belief that they would comply with the legal principles set forth in its decision. 353 F.Supp., at 136, Petition, App. "C", at 35-36. It added that "in the unlikely event that defendants do conduct such a search against plaintiffs in the future, plaintiffs are free to renew their motion for a permanent injunction." *Id.* The District Court also awarded Respondents the sum of \$47,500 in attorneys' fees. 366 F.Supp. 18, 64 F.R.D. 680, Petition, App. "D" and "E".

On June 1, 1973, two investigators employed by Petitioner Bergna searched the patient files of the Psychiatry Clinic at Stanford University Medical Center. III C.T. 559-60; *id.*, at 567, ¶ 3; *id.*, at 569-70; *id.*, at 572, ¶ 5. The search warrant covered the medical file of Mr. Robert Carlino, a patient at the Clinic, and all other records prepared by Dr. Marguerite Lederberg, the psychiatrist who had seen Mr. Carlino on at least two occasions. These records were evidently sought in connection with a pending prosecution of a sex offense in which Mr. Carlino was the victim. See III C.T. 542-44. The search of the Clinic, a third party unsuspected of any crime, was conducted in spite of an outstanding subpoena duces tecum issued to Dr. Lederberg. The subpoena had not then become operative, and Dr. Lederberg's counsel was attempting to obtain a hearing on the validity of Mr. Carlino's

Petitioners do not dispute the courts' conclusion as to the irrelevance of Brown's unstated "reasons" for seeking a search warrant, but nevertheless include them in their brief in an unsubtle attempt to cast doubts upon the integrity of the *Daily* and its staff. We shall therefore deal with this gratuitous slur hereafter. See note 21, *infra*. For the present, suffice it to say that (1) the editorial to which Brown referred was intended and understood by the *Daily* to contemplate the routine non-retention of photographs which, if retained, might prompt issuance of a subpoena and not to any material once a subpoena had issued; (2) the policy of the *Daily* was and is not to destroy any material covered by a judicially authorized subpoena; and (3) no such destruction has ever occurred.

consent to disclosure of his psychiatric records. III C.T. 561-65, especially ¶¶ 4-6, 8-9.

No effort was made before the magistrate to establish probable cause to believe that Dr. Lederberg would destroy Mr. Carlino's medical records, and the magistrate made no such finding. In the course of the search, police officers looked through the files of the Clinic. See III C.T. 572. Those files included patient records, wholly unrelated to those of patient Carlino, which were plainly covered by the physician-patient privilege.

Because this new search reflected an apparent disregard of the District Court's decision in this case, a renewed motion for an injunction was noticed. III C.T. 532. In connection with that motion, Petitioner Bergna made certain representations to the District Court, which thereupon ruled that "because the District Attorney assures the Court that the *Daily* will not be the object of a Third Party Search, the Motion for Preliminary Injunction is DENIED." III C.T. 670.

The Court of Appeals affirmed. 550 F.2d 464, Petition, App. "A". That court adopted the opinion of the District Court on the merits. Accordingly, the Court of Appeals' opinion discussed only certain procedural issues raised on appeal by Petitioners, some of which are now the subject of these petitions. The Court of Appeals rejected the contention that Petitioners' professed good faith insulates them from declaratory relief; found the Civil Rights Attorney's Fees Awards Act (hereafter called "the Act") applicable to cases pending on appeal at the time of its passage; and concluded that the Act applied to cases such as this one.

SUMMARY OF ARGUMENT

I.

Petitioners view this case as if only the Fourth Amendment is implicated. But the search of a newspaper must be judged by the more restrictive standards that apply where First and Fourth

Amendment interests coalesce. The issue in this case is procedural. It does not deal with *what* evidence the police may obtain from the files of a newspaper unsuspected of crime, but *how* that information should be obtained. In at least two fundamental respects, execution of a search warrant—in contrast with a subpoena—is needlessly destructive of interests protected by the First Amendment.

First, a search forecloses judicial consideration of any objections to production which the newspaper may have. Unlike a subpoena, which may be challenged by a motion to quash, a search warrant may not lawfully be resisted and is executed without prior notice. The *ex parte* consideration by a magistrate of a warrant application is an inadequate vehicle for resolution of the sensitive balances which must be struck. The newspaper's grounds for objection rarely will be appreciated by the police officer seeking the warrant, let alone fully made known to the magistrate. Accordingly, where compulsory production of the document sought is constitutionally offensive, exempt from production under a state "shield law", or otherwise improper, a search repudiates the assumption of *Branzburg v. Hayes*, 408 U.S. 665, 708 (1972) that "[g]rand juries are subject to judicial control and subpoenas to motions to quash."

Second, even where the police are entitled to demand production of particular evidence from a newspaper's files, a subpoena permits the newspaper to locate and transmit that evidence to the police. In contrast, a search exposes to police scrutiny unrelated materials, which may be highly confidential and sensitive, retained in the newspaper's offices and files. Wherever a subpoena would be effective to achieve production of the evidence sought, such a breach of privacy is unnecessary.

No substantial interests of law enforcement are jeopardized by a requirement that the police utilize a subpoena to obtain evidence from non-suspect newspapers. There is no basis for a

generalized suspicion that newspapers will not obey the law and produce that which is demanded. If, in the exceptional case, the police have reason to believe that a subpoena will not suffice—whether because the newspaper would destroy the evidence sought or otherwise—they must make that showing to the magistrate; if the magistrate finds upon a suitable record that a subpoena would be impractical, a search warrant may issue.

Where a subpoena is not found to be impractical, it is a "less drastic means" than a search for achieving production of evidence from a newspaper and must be utilized.

II.

Even when the third party from whom evidence is sought is not a newspaper entitled to the heightened protections of the First Amendment, where that party is unsuspected of criminal activity, the subpoena is the usual means by which evidence is obtained. In that setting, a search may impair particularly sensitive privacy interests. Among the likely targets of third party searches are those who maintain files relating to numerous individuals, such as lawyers, physicians, psychiatrists, banks, accounting firms, employers, and the like. Often such information is privileged. Even if it is not, the search of third parties for evidence relating to a criminal suspect needlessly exposes the files of unrelated, non-suspects to police scrutiny.

Petitioners view the decision of the courts below as posing insurmountable impediments where the third party believed to possess evidence is a friend, relative or associate of a criminal suspect so that there is a risk that the third party will destroy the evidence sought. But often, as in this case, the converse is true, and what the magistrate is told about the third party in the warrant application provides assurance that a subpoena will be honored.

A search of a third party is unreasonable under the Fourth Amendment when it is plain that a subpoena would be no less efficacious. Such a search is impermissible where the evidence presented to the magistrate affirmatively shows that (1) the third party occupies no relationship to the suspect such as would suggest a risk that the evidence might be destroyed; (2) the third party's status, demonstrated behavior, or the circumstances by which the evidence came to be in its possession, negates the risk of destruction; (3) lawful grounds may exist to resist compelled production; (4) particularly sensitive privacy interests of the third party (and of others whose confidences may be reflected in documents possessed by it) will be impaired; and (5) a subpoena is not otherwise impractical.

III.

Declaratory relief against the police officers was proper. Even if the officers did not act in "bad faith" in obtaining or executing the warrant (so that a qualified immunity from money damages would be overcome), such immunity does not bar injunctive relief, let alone declaratory relief.

IV.

The award of attorneys' fees was authorized by the Civil Rights Attorney's Fees Awards Act. Congress clearly demonstrated its intent that the Act apply retroactively to all pending cases; indeed, absent a direction that it only apply prospectively, it would be applicable to pending cases. *Bradley v. Richmond School Board*, 416 U.S. 696 (1974).

Petitioners' contention that immunities from damages likewise bar a fee award is without merit. If a finding of "bad faith" were necessary, the Act would accomplish nothing, as the award of fees in "bad faith" cases has long been permitted. The legislative intent to broaden the availability of fees, and to eliminate the neces-

sity of showing "bad faith", is clear from the Act's history. Indeed, the Act was patterned after statutes which, on two occasions, the Court construed to authorize the award of attorneys' fees without regard to the good or bad faith of the defendants. *Bradley v. Richmond School Board*, *supra*; *Newman v. Piggie Park Enterprises*, 390 U.S. 400 (1968).

ARGUMENT

I. In Order for a Search Warrant to Issue Authorizing the Search of a Non-Suspect Newspaper for the Purpose of Obtaining Evidence, the Magistrate Must Be Furnished Evidence Establishing Probable Cause That a Subpoena Duces Tecum Would Be Impractical

One reading the briefs of Petitioners and the *amici* who support them could easily overlook that *The Stanford Daily* is a newspaper and that the items sought in the search were not weapons, contraband or instrumentalities of crime, but, rather, the fruits of journalists engaged in gathering and reporting the news to the public. Although Petitioners—and especially their supporting *amici*—appear to be more concerned with their right to search non-suspect third parties who are not engaged in journalistic activity protected by the First Amendment, *this* case involves only non-suspects who are.

It is well, therefore, to address at the outset the central issue presented by this record and, in so doing, to stress what this case does *not* involve. *First*, no question is presented here as to the power of law enforcement to seize, with or without a warrant, drugs, other contraband, unlawful weapons, or the fruits of illegal activity. As the Court observed in *Roaden v. Kentucky*, 413 U.S. 496, 502 (1973), "[t]he seizure of instruments of a crime, such as a pistol or a knife, or 'contraband or stolen goods or objects dangerous in themselves,' . . . are to be distinguished from quantities of books and movie films." Presumably, any person—journalist or otherwise—possessing items of the former variety

is on notice of their illegality and is therefore not a "nonsuspect third party." The "nexus . . . between the item to be seized and criminal behavior" is "automatically provided in the case of fruits, instrumentalities or contraband." *Warden v. Hayden*, 387 U.S. 294, 307 (1967). Here, the items were photographs, obtained in the course of journalistic activity, sought for use in a criminal investigation.

Second, no emergency situation existed. Whatever may be the rule where life or property is threatened unless the police can act immediately, no claim is made here that the circumstances required instant access to the photographs.

Third, no question is presented as to the propriety of searching a newspaper office where the newspaper or a member of its staff is suspected of criminal activity. In this case, Petitioners entertained no doubts as to the *Daily's* noninvolvement in the unlawful activity which they were investigating. Whatever may be said in support of Petitioners' remarkable assertion that "[i]n many cases, the label 'nonsuspect' means only that the person's involvement in the crime has not as yet been established" (Zurcher Brief, at 18), the showing made to the magistrate in *this* case affirmatively demonstrated that the photographs sought were thought to be in the possession of the *Daily* precisely because it was a newspaper and had obtained them in the ordinary course of its journalistic activities.

It was against this background that the courts below ruled. They did not question the proposition that, in appropriate circumstances, the police may obtain information or documents possessed by the press. Viewing the issue as involving *how*, and not *what*, documents may be obtained from a newspaper's file, the courts concluded that, in comparison with the use of a search warrant, a subpoena was a far less intrusive means and therefore constitutionally preferred. Two basic reasons supported these conclusions.

In the first place, a subpoena only authorizes disclosure of the items sought. It preserves the privacy and confidentiality of all other files and documents not relevant to the investigation. "[T]he police do not go rummaging through one's home, office, or desk if armed only with a subpoena." 353 F.Supp., at 130; Petition, App. "C", at 21. In short, a subpoena must be precise and targeted, while a search is inherently "indiscriminate" in terms of what must be examined in quest of the object sought. 353 F.Supp. at 135; Petition, App. "C", at 31.

Secondly, a search denies the newspaper any opportunity to challenge the compelled disclosure of materials deemed by it to be confidential, privileged, or otherwise legally protected, and "deprives the newspaper . . . of that 'judicial control' thought so essential in *Branzburg*." *Id.*, at 135; Petition, App. "C", at 32.

Accordingly, the courts below held that law enforcement agencies may not obtain a search warrant against a newspaper, itself not suspected of criminal activity, for the purpose of obtaining evidence,² without first furnishing to the magistrate probable cause to believe that a subpoena duces tecum is impractical. Where there is a showing that materials will "be destroyed or removed from the jurisdiction despite [a] restraining order", a magistrate may find that a subpoena is impractical and issue a warrant. 353 F.Supp., at 133; Petition, App. "C", at 28. The courts below articulated standards which fully preserve the interests of law enforcement while providing appropriate protection to important interests safeguarded by the First and Fourth Amendments.

A. WHERE A SEARCH AFFECTS FREEDOM OF SPEECH OR PRESS, THE FIRST AND FOURTH AMENDMENTS REQUIRE EXACTING AND DISCRIMINATING PROCEDURES.

Petitioners' preference for viewing this case as if the object of the search was not engaged in activities which lie at the core of

2. We use the term "evidence" in the sense of the now-discarded "mere evidence" rule (see *Warden v. Hayden*, 387 U.S. 294 (1967)), to distinguish it from contraband, fruits of unlawful activity, or items dangerous in themselves.

the First Amendment cannot be indulged. An unbroken line of decisions firmly establishes that both the standards and procedures for the issuance and execution of search warrants and the conduct of searches are more restrictive when applied in the press context. See, e.g., *United States v. United States District Court*, 407 U.S. 297, 313-14 (1972); *Roaden v. Kentucky*, 413 U.S. 496, 501, 504 (1973); *Heller v. New York*, 413 U.S. 483, 489-94 (1973); *Stanford v. Texas*, 379 U.S. 476, 484-85 (1965); *A Quantity of Books v. Kansas*, 378 U.S. 205 (1964); *Marcus v. Search Warrant*, 367 U.S. 717 (1961); compare *United States v. Ramsey*, _____ U.S. _____, 52 L.Ed.2d 617, 631 n. 18 (1977).

As the Court not long ago observed, cases which "reflect a convergence of First and Fourth Amendment values not present in cases of 'ordinary' crime . . . [involve] greater jeopardy to constitutionally protected speech." *United States v. United States District Court*, *supra*, at 313. The Court also repeated the observation made previously in *Marcus v. Search Warrant*, *supra*, at 724, that "[h]istorically, the struggle for freedom of speech and press in England was bound up with the issue of the scope of the search and seizure power." That history, carefully traced in the *Marcus* opinion, certainly confirms that statement and the Court's further observation that the "Bill of Rights was fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression." *Id.*, at 729.

Presence of First Amendment interests therefore "calls for a higher hurdle in the evaluation of reasonableness." *Roaden v. Kentucky*, *supra*, at 504. In *Roaden*, a warrantless seizure of an allegedly pornographic film incident to a valid arrest was held unconstitutional. Uncontestably, such a seizure of material from the person of a validly arrested individual would have been sustained but for the First Amendment interests involved. See also *Lee Art Theatre v. Virginia*, 392 U.S. 636 (1968). Similarly, in cases involving the seizure of allegedly obscene books pursuant to

warrants, conventional Fourth Amendment standards have been held insufficient in evaluating searches under warrants issued without prior adversary hearing. *Marcus v. Search Warrant*, *supra*; *A Quantity of Books v. Kansas*, *supra*; see also *Heller v. New York*, *supra*. "A seizure reasonable as to one type of material in one setting may be unreasonable in a different setting or with respect to another kind of material." *Roaden v. Kentucky*, *supra*, 496, 501 (1973). Under the self-evident principle of *Roaden*, the courts below plainly were correct in taking the view that "[t]he First Amendment is *not* superfluous . . . to the extent that extra [Fourth Amendment] protections may be required when First Amendment interests are involved." 353 F.Supp. at 134, Petition, App. "C", at 30 (original emphasis).

B. POLICE SEARCHES OF NEWSPAPER OFFICES IMPAIR IMPORTANT INTERESTS PROTECTED BY THE FIRST AND FOURTH AMENDMENTS.

As the courts below recognized, the search of a newspaper severely threatens its ability to gather and report the news:

"The threat to the press's newsgathering ability, however, is much more imposing with a search warrant than with a subpoena.

"1) A reporter or photographer responding to a subpoena will bring to the grand jury hearing only those materials mentioned in the subpoena; the police officers executing a warrant, however, will be in a position to see notes and photographs not even mentioned in the warrant. As is apparent from the affidavits, newspaper offices are much more disorganized than, say, the average law office; a search for particular photographs or notes will mean rummaging through virtually all the drawers and cabinets in the office. The 'indiscriminate nature' of such a search renders vulnerable all confidential materials, whether or not identified in the warrant, and the concomitant threat to the gathering of news—which frequently depends on confidential relationships—is staggering.

"2) Unlike the issuance of a subpoena or subpoena duces tecum, the *ex parte* issuance and execution of a search warrant deprives the newspaper and newsman of that 'judicial control' thought so essential in *Branzburg* [*v. Hayes*, 408 U.S. 665 (1972)].

"3) There is also a possibility that police searches will jeopardize a newspaper's credibility and create a risk of self-censorship. [citation]

"Because a search presents an overwhelming threat to the press's ability to gather and disseminate the news, and because 'less drastic means exist to obtain the same information, third-party searches of a newspaper office are impermissible in all but a very few situations. A search warrant should be permitted only in the rare circumstance where there is a *clear showing* that 1) important materials will be destroyed or removed from the jurisdiction; and 2) a restraining order would be futile. To stop short of this standard would be to sneer at all the First Amendment has come to represent in our society." (353 F.Supp., at 134-35, Petition, App. "C", at 31-33, emphasis in original.)

In so concluding, the courts below correctly identified the severe and needless harm to a free and independent press worked by searches such as that imposed upon *The Stanford Daily*. The First Amendment protects the freedom of the press to gather,³ and disseminate the news and the correlative right of the public to receive it.⁴ This constellation of freedoms—designed "to supply the public need for information and education with respect to the significant issues of the times" (*Thornhill v. Alabama*, 310

3. See, e.g., *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972); *Associated Press v. KVOZ*, 80 F.2d 575, 581 (9th Cir. 1935), reversed on other grounds, 299 U.S. 265 (1936); *Providence Journal Co. v. McCoy*, 94 F.Supp. 186, 195-96 (D.R.I. 1950), aff'd on other grounds, 190 F.2d 760 (1st Cir. 1951).

4. See, e.g., *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943); *Lamont v. Postmaster General*, 381 U.S. 301 (1965); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969).

U.S. 88, 102 (1940))—is, simply, what the First Amendment is all about.⁵

The issue in this case is not *what* evidence the state may obtain from the files of a newspaper but *how* that information should be obtained. *Branzburg v. Hayes*, 408 U.S. 665 (1972) rejected broad claims of a First Amendment privilege to withhold testimony concerning illegal acts witnessed by newsmen. Under that decision, in many situations, a journalist may be compelled by subpoena to testify or to produce documents which he or she would prefer to hold in confidence. The Court's opinion in *Branzburg*, and the careful balance it struck between the interests of a free press and the needs of law enforcement, is mocked by the crude and unnecessary blunderbuss used by Petitioners to obtain materials from the *Daily's* files.

The "limited nature of the Court's holding" (Powell, J., concurring, *id.*, at 709) was emphasized by the concluding passage of the Court's opinion:

"Finally, as we have earlier indicated, news gathering is not without its First Amendment protections, and grand jury investigations if instituted or conducted other than in good faith, would pose wholly different issues for resolution under the First Amendment. Official harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification. *Grand juries are subject to judicial control and subpoenas to motions to quash. We do not expect courts will forget that grand juries must operate within the limits of the First Amendment as well as the Fifth.*" (*Id.*, at 707-08, emphasis added.)

5. See, e.g., *Stromberg v. California*, 283 U.S. 359, 369 (1931); *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936); *De Jonge v. Oregon*, 299 U.S. 353, 363 (1937); *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949); *Smith v. California*, 361 U.S. 147, 153 (1959); *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964); *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967).

Mr. Justice Powell stated in concurrence:

"The Court does not hold that newsmen, subpoenaed to testify before a grand jury, are without constitutional rights with respect to the gathering of news or in safeguarding their sources. . . .

. . . . If a newsman believes that the grand jury investigation is not being conducted in good faith he is not without remedy. *Indeed, if the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement, he will have access to the Court on a motion to quash and an appropriate protective order may be entered.* The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests *on a case-by-case basis* accords with the tried and traditional way of adjudicating such questions." (*Id.*, at 709-10, emphasis added.)

Nothing in *Branzburg* does or could cast any doubt upon the grave injury inflicted by the search of a newspaper's offices. That injury poses a deadly threat to First Amendment freedoms—different, both in degree and in kind, from those factors considered and balanced in *Branzburg*:

(1) *Disruption and Interference.* The most obvious impact of a press search is the immediate interruption of the news gathering and disseminating activities of a newspaper. However inconvenient responding to a subpoena duces tecum may be from the standpoint of those engaged in journalism, the dislocations of a full-scale search are vastly greater. The point was compellingly made by Gordon Manning, Director of News for CBS News:

"To allow this kind of free-wheeling search is to invite more searches, since a working newsroom contains an

abundance of information, much of which would be argued by investigators to be useful Not only would the news gathering and reporting functions be inhibited in an exaggerated but a similar way to which the subpoena power inhibits, but also the very ability of a news organization to operate would be threatened. A search warrant presumes that material must be sifted before the needed material is located. I can imagine the workings of a newsroom being brought to a complete halt while the voluminous and as yet unorganized information is 'searched.'"

(App. 124, at ¶ 5.) CBS anchor man Walter Cronkite described the consequences of such a search as "total chaos in terms of the ability of the staff to produce honest professional news coverage." (App. 58, at ¶ 4.) For a newspaper, the consequences are equally disastrous. See Affidavit of Frank Haven, managing editor of the *Los Angeles Times*, App. 63, at ¶ 6.⁶

Palpably, the total disruption of a newspaper office necessarily caused by the execution of a search warrant is entirely different from the limited intrusion into the journalist's workday caused by requiring a timely response to a subpoena.

(2) *Chilling of Sources Through Needless Breaches of Confidentiality.* That the compelled disclosure by a journalist of information given in confidence, or the names of confidential sources, has the direct and devastating effect of impairing his

6. These concerns prompted one commentator to state:

"A search may severely disrupt the functioning of the entire press facility for several hours. When the item sought is a letter or photograph, ingress to files, desks, broadcast booths, or paste-up rooms may be unavoidable. Newspapers in particular tend to accumulate notes, back issues, and photographs. The presence of police officers rifling through these files cannot but disrupt normal functions—functions that at many press facilities continue around the clock. This disruption . . . impedes timely publication or broadcast. . . ."

Note, *Search and Seizure of the Media: A Statutory, Fourth Amendment and First Amendment Analysis*, 28 STAN. L. REV. 957, 989 (1976).

access to relevant news is well documented.⁷ The record in this case fully confirms that conclusion. See, e.g. Kneeland Affidavit, App. 67, at ¶ 3. Haven Affidavit, App. 61, at ¶ 4(a).⁸

However grave the consequences of disclosure pursuant to a subpoena, the consequences of a search are far more damaging. *New York Times* reporter Douglas Kneeland stated:

7. See, e.g., Guest & Stanzler, *The Constitutional Argument for Newsmen Concealing Their Sources*, 64 NW. U. L. REV. 18 (1969); Goldstein (Abraham S.), *Newsmen and Their Confidential Sources*, THE NEW REPUBLIC, March 21, 1970, p. 13; Note, *The Right of the Press to Gather Information*, 71 COLUM. L. REV. 838 (1971). Note, *Reporters and Their Sources: The Constitutional Right to a Confidential Relationship*, 80 YALE L. J. 317 (1970); Comment, *The Newsmen's Privilege: Government Investigations, Criminal Prosecutions and Private Litigation*, 58 CALIF. L. REV. 1198 (1970); Comment, *The Newsmen's Privilege: Protection of Confidential Associations and Private Communications*, 4 J. LAW REFORM 85 (1970); Comment, *Constitutional Protection for the Newsmen's Work Product*, 6 HARV. CIVIL RIGHTS-CIVIL LIBERTIES L. REV. 119 (1970); Blasi, *The Newsmen's Privilege: An Empirical Study*, 70 MICH. L. REV. 229 (1971); Murasky, *The Journalist's Privilege: Branzburg and Its Aftermath*, 52 TEX. L. REV. 829, 856-66 (1974); Goodale, *Branzburg v. Hayes and the Developing Qualified Privilege For Newsmen*, 26 HAST. L. J. 709 (1975); Comment, *The Newsmen's Privilege After Branzburg: The Case For a Federal Shield Law*, 24 U.C.L.A. L. REV. 160 (1976).

8. The needs of a newspaper to respect confidences and to withhold unpublished materials are particularly felt by news photographers. Their very safety frequently is imperiled when covering demonstrations or other tempestuous events. See Haven Aff., *supra*, App. 62, at ¶ 4(c); Kneeland Aff., *supra*, App. 70-71, at ¶ 7. The hazards of a *Daily* photographer, particularly after the search in question, are described in the Affidavits of Steven G. Ungar (App. 142-47), Charles Lyle (App. 78-79, at ¶¶ 4-5), and Don Tollefson (App. 133-35, at ¶ 9). Photographers (and particularly their cameras when the film contains photographs of lawlessness) are often the target of violence. Their ability to record events, and to place themselves in particularly advantageous positions, often depends upon the cooperation of those who may be photographed, which is more likely to be given if there is assurance that the media will not provide unpublished photographs to law enforcement authorities.

Of course any person photographed must hazard the risk that the picture will be published. That editorial decision, as former Editor Fred Mann's Affidavit makes clear, is made solely on grounds of newsworthiness "without regard to whether the photographs might be incriminating to the persons depicted therein." (App. 85, at ¶ 21).

"The more sophisticated sources know that newsmen may be subject to subpoena; but they also know that recent court opinions provide a basis for lawful challenge to subpoenas. On the other hand the intrusion of a search is indiscriminate; its scope and propriety cannot be judicially tested in advance; and the mere possibility of its use renders vulnerable all confidential materials."

App. 69, at ¶ 5. Walter Cronkite likewise stated:

"While the potential of such a chilling effect is great when more common tools such as the subpoena power are used, the 'fishing expedition' nature of a search warrant makes it a particularly dangerous threat."

App. 68-69, at ¶ 5; see also Roberts Aff., App. 128, at ¶ 7. A search, of course, is necessarily indiscriminate in what it looks through, however discriminating in what it looks *for*. While the police may seize only that material specified in the search warrant, the execution of the warrant requires a prior inspection of *all* documents and materials in the office. The confidentiality of information and materials *not* sought—and as to which no showing of probable cause even is attempted—is nevertheless breached. It is true that, given *Branzburg*, potential news sources must hazard the possibility of compelled disclosure upon the issuance of a subpoena, but only after appropriate judicial challenge by the newsperson and a careful judicial balancing in an adversary setting. Petitioners would require potential news sources also to risk the possibility of the inadvertent breach of their confidences as a consequence of a search for *wholly unrelated* materials.⁹

9. The affidavits submitted to the District Court established that the search of the *Daily's* offices resulted in the inspection of filing cabinets, desks, shelves and wastebaskets. The desks contained, and thus the officers were in a position to see, notes taken by reporters in the course of interviews conducted for the purposes of gathering news (App. 88, at ¶ 25; App. 132, at ¶¶ 5-6), some of which contained information given in confidence and on the express understanding that the name of the source

To the extent that unrelated materials are examined, a search causes needless and irreparable breaches of the confidentiality of newspaper files. As the courts below recognized:

"[A] search for particular photographs or notes will mean rummaging through virtually all the drawers and cabinets in the office. The 'indiscriminate nature' of such a search renders vulnerable all confidential materials, whether or not identified in the warrant. . . ." (353 F.Supp., at 134-35; Petition, App. "C", at 31-32).

(3) *Impairment of Press Independence.* There is a related danger that the press will cease to be perceived by the public as an independent, credible, and neutral communicator of the news. Mr. Haven of the *Los Angeles Times* put the point succinctly:

"To the extent that a newspaper, its personnel and files are used by defense or prosecution, the objective informational role of the newspaper is severely damaged, the credibility of the newspaper is lost and it comes to be viewed as simply another agent of whichever side has chosen to involve the newspaper."

App. 61-62, at ¶ 4(b). Walter Cronkite commented with specific reference to this case:

"Perhaps the most shocking aspect of *The Stanford Daily* search was the fact that the police were utilizing the offices

would not be disclosed. *Id.* The officers saw, scanned or read business and personal correspondence of the *Daily* and members of its staff. App. 74-75, at ¶¶ 20-21; App. 132, at ¶ 6; App. 140-41. Ungar Aff., IIIA C.T. 939; Kohn Aff., I C.T. 351, Para. 21; Tollefson Aff., IIIA C.T. 925, Para. 5. Officers Peardon, Martin, Bonander, and Deisinger submitted affidavits in which they state that they only looked "carefully" at pictures, negatives and film, examined "only very briefly" (App. 168) other materials, and refrained from actually reading any written documents. See App. 155-69. The courts below did not find it necessary to resolve the point, for it was not disputed by Petitioners that, whether or not they actually did so, they were in a position to read and examine confidential materials not the subject of the warrant.

of the *Daily* to determine the availability of evidence. The extension of the news office from a news gathering function to an investigating agency of the authorities is terrifying. Professional news gathering facilities cannot be permitted to be used as evidence gathering agencies in either criminal or civil proceedings without losing all trace of the independence and integrity on which the journalistic profession is founded." (App. 59, at ¶ 6).¹⁰

(4) *Pressures For Self-Censorship.* The severe consequences to a free press discussed thus far and those hereafter to be chronicled—disruption, chilling of sources, denial of access to newsworthy events, disclosure of materials and information *not* the subject of the warrant, a denial of an opportunity for prior judicial challenge, and the destruction of journalistic independence—may inevitably lead a conscientious journalist to conduct himself so as to minimize the possibility that a subpoena will issue or a search be conducted. Gordon Manning, Director of News for CBS News, stated:

"[R]eporters may be tempted to be timid in choosing and preparing their reports through fear of themselves being subpoenaed, and the temptation arises to destroy outtake [i.e. unused film] material which might otherwise be useful for follow-up reports or historical preservation."

10. The *Daily's* former Editor, Fred Mann, made the point compellingly:

"Furthermore, a paper loses all credibility when it acts or is compelled to act in the express interests of one group against another. The ideal of objectivity may be a myth, but the struggle to reach that idealistic goal is imperative for all papers from the New York Times to any college paper. . . . Whether the demonstrators at the Stanford Hospital or any other site were right or wrong in their protest is not the point; the *Daily* attempts to cover the story and present as clear a picture as possible. We do not attempt to 'bring law-breakers to justice' through our news coverage, although at times we might editorially think that that should be done. Any interference with the *Daily's* operation and its organizational philosophy truly cripples the newspaper as an effective and unbiased disseminator of information." (App. 88-89, at ¶ 26).

App. 124, at ¶ 4. The National News Editor of *The New York Times*, Gene Roberts, similarly stated:

"If reporters and photographers believe that the information they gather will be available to government officials, they will not be eager to get the sensitive story, or to track down the individual who will supply the critical information. And I, as an editor, will consider carefully before publishing facts, or a photograph, which might imply that there is more than appears.

"All reporters have taken written notes of factual disclosures received in confidence. If such notes are subject to police seizure, it is likely that reporters will stop bringing them back to their offices and using them as aids in preparing their stories. I am obviously concerned for the quality and character of journalism if reporters refrain from taking notes or taping interviews for fear that this raw stuff might be easily available to government officials through the device of a search warrant." (App. 128-29, at ¶¶ 8-9).

In this case, the police affidavit upon which a search warrant for *The Stanford Daily's* offices was issued recited that the *Daily's* Sunday edition had published photographs over the byline of a *Daily* staff photographer, which led the affiant to conclude that the named staffer had been in a position to take photographs of what the police wanted. App. 35. The Sunday edition was submitted to the magistrate to support the warrant. *Id.* The message of all this is too clear for intelligent members of the working press to ignore: self-censorship is the price of security.

C. SEARCHES OF NON-SUSPECT NEWSPAPERS FOR EVIDENCE VIOLATE THE FIRST AND FOURTH AMENDMENTS BECAUSE OTHER LESS INTRUSIVE PROCEDURES ADEQUATELY SERVE THE LEGITIMATE INTERESTS OF LAW ENFORCEMENT AND BECAUSE SEARCHES ARE EXCESSIVELY DESTRUCTIVE OF PROTECTED INTERESTS.

In the previous section, we described a variety of interests which are impaired or completely frustrated by the use of press searches to obtain evidence. To the extent that any of these

factors also is implicated in the case of a subpoena, then of course the balance has been struck and, at least so far as the Constitution is concerned (see *Branzburg v. Hayes*, *supra*, at 706), the press must bear that burden. In many instances, absent a state "shield" law, the newspaper or reporter lawfully can be compelled by subpoena to produce material. But as the foregoing discussion demonstrates, the nature and degree of injury to First Amendment interests which is visited by execution of a search warrant differs markedly from that entailed by a subpoena. A search warrant in this setting is a blunderbuss where the Constitution commands "more sensitive tools." *Speiser v. Randall*, 357 U.S. 513, 525 (1958).

1. Execution of a Search Warrant Forecloses the Newspaper's Opportunity for a Judicial Determination of Any Legal Objections to Production of the Evidence Sought.

A serious deficiency of the police search of newspaper offices is that it effectively forecloses judicial consideration of any legal objections which the newspaper may have to production. There are several available grounds, both constitutional and non-constitutional, for successful challenge to a subpoena duces tecum addressed to the press.

Branzburg rejected the notion of a broad, constitutionally grounded privilege to refuse to answer questions concerning confidential sources. But, as already noted (see pp. 17-18, *supra*), both the majority opinion and Mr. Justice Powell's concurring opinion make it plain that *Branzburg* did not announce an end to all constitutional limitations on the power of grand juries, courts and prosecutors to obtain information held in confidence by journalists. See *United States v. Dionisio*, 410 U.S. 1, 11-12 (1973). Justice Powell stressed the need for a case-by-case scrutiny of both the claimed need for the information sought and the potential injury to First Amendment freedoms if disclosure is compelled: "The asserted claim to privilege should be judged on its facts by

the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct." *Id.*, at 710. Justice Powell and the majority opinion thus relied, for "the striking of a proper balance," upon the availability of judicial scrutiny *before* a newsman could be compelled to divulge information held by him in confidence. Accordingly, the lower federal and state courts have understood *Branzburg* to require a careful, case-by-case consideration and weighing of interests whenever legal process is sought to obtain confidential information from the news media.¹¹

11. See, e.g., *Silkwood v. Kerr McGee*, F.2d, No. 77-1287 (10th Cir. 1977); *United States v. Doe*, 541 F.2d 490, 493 n.6 (5th Cir. 1976); *In re Grand Jury Proceedings*, 486 F.2d 85 (3d Cir. 1973); *United States v. Steelhammer*, 539 F.2d 373 (4th Cir. 1976); *Carey v. Hume*, 492 F.2d 631, 636 (D. C. Cir. 1974), *pet. for cert. dismissed*, 417 U.S. 938 (1974); *United States v. Liddy*, 478 F.2d 586, 587 (D.C. Cir. 1972); *Baker v. F. & F. Investment*, 470 F.2d 778 (2d Cir. 1972); *cert. den.* 411 U.S. 966 (1973); *Bursey v. United States*, 466 F.2d 1059, 1092 (9th Cir. 1972) (opinion on denial of rehearing); *Gilbert v. Allied Chemical Corp.*, 411 F.Supp. 505 (E.D. Va. 1976); *Apel v. Murphy*, 70 F.R.D. 651 (D.R.I. 1976); *Democratic National Committee v. McCord*, 356 F.Supp. 1394 (D.D.C. 1973); *State v. St. Peter*, 315 A.2d 254 (Vt. 1974); *Brown v. Commonwealth*, 204 S.E.2d 429 (Va. 1974); *Spiva v. Franconer*, 39 Fla. Supp. 49 (1973). Thus, in the *Baker* and *McCord* cases, the courts declined to enforce subpoenas where, on balance, it appeared that "the public interest in non-disclosure of journalists' confidential news sources" (*Baker v. F & F Investment*, *supra*, at 785) outweighed the need for disclosure. In *United States v. Steelhammer*, *supra*, the Court of Appeals reversed contempt convictions of reporters upon a determination that the information sought could be obtained from others without impairing the confidentiality of press sources. And in *In re Lewis*, 501 F.2d 418, 422 (9th Cir. 1974), *cert. den.*, 420 U.S. 913 (1975), the court, while finding the balance of interest resting on the side of enforcement of a press subpoena, acknowledged that under *Branzburg* a newsman "is not forsaken by the Constitution simply because a Federal Grand Jury would obtain information from him." See also *Farr v. Pitchess*, 522 F.2d 464 (9th Cir. 1975).

Numerous unreported lower court cases following *Branzburg* are collected in the *Press Censorship Newsletter* published by the Reporters Committee For Freedom of the Press, Legal Defense and Research Fund, Washington, D.C. (hereafter "*Newsletter*"). While the lower courts have exhibited considerable uncertainty since *Branzburg*, in numerous instances lower courts have recognized a qualified privilege for newsmen to refuse

The First Amendment is not, of course, the sole source of authority for lawful opposition to a press subpoena. The Court of Appeals for the Third Circuit recently listed some of the other grounds:

"Among the defenses which may be presented in resisting a subpoena are the obvious constitutional defenses of unreasonable search and seizure [citations], and self incrimination [citation]. But many nonconstitutional defenses also are available, including undue breadth [citation], improper inclusion of irrelevant information [citation], lack of authority to conduct the investigation in issue [citation], and improper issuance of a given subpoena [citation]." (*In Re Grand Jury Proceedings*, 486 F.2d 85, 91 (3d Cir. 1973).)

In addition, of course, the newspaper which is served with a subpoena may respond, and may convince a court, that the subpoenaed material simply does not exist.

Moreover, at least 26 states have enacted "shield" laws which provide varying degrees of protection to the confidentiality of information and materials possessed by the news media. See generally, Comment, *Newsmen's Privilege Two Years After Branzburg v. Hayes: The First Amendment in Jeopardy*, 49 TUL. L. REV. 417, 436-38 (1975); Note, *supra* note 6, at 960-67. Section 1070 of the California Evidence Code is such a law. Although the unpublished photographs sought by the police in this case appeared to be outside the scope of California's "shield" law at

to divulge sources or other confidential information. See, e.g., *Newsletter* No. II, July-August, 1973, at 15 (item 11); *Newsletter* No. III, November-December, 1973, at 10 (item 5); *id.*, at 11 (item 7); *Newsletter* No. V, August-September, 1974, at 13 (item 9); *id.*, at 34 (item 9); *id.* (item 10); *Newsletter* No. VI, December, 1974-January, 1975, at 33 (item 13); *id.* (item 14); *id.* (item 15); *id.*, at 35 (item 21); *id.*, at 38 (item 34); *Newsletter* No. VII, April-May, 1975, at 8-9 (item 11); *id.*, at 14 (item 29); *Newsletter* No. VIII, at 24 (item 12); *id.*, at 24-25 (item 16-17); *Newsletter* No. IX, April-May, 1976, at 39 (item (v)); *id.*, at 46 (item 34); *Newsletter* No. X, September-October, 1976, at 40 (item 9); *id.*, at 49 (item 39).

the time of the search, Section 1070 was amended in 1974 to protect unpublished information including "notes, outtakes, photographs, tapes or other data of whatever sort . . ."¹² It plainly covers much of the material that would be found in a newsroom, in the files of a newspaper, or in the desk drawers of a reporter. A search of a newspaper inevitably requires the police officers to examine materials which Section 1070 protects against compelled disclosure; and often the object of the search would also be protected by Section 1070.¹³

Potential grounds will therefore exist in many cases for legal challenge to a subpoena duces tecum which calls for the production of unpublished information or materials in the files of a newspaper. For present purposes, the standards to be applied on the hearing of such a motion are irrelevant; it is enough to say that it will be for the court, after consideration of the arguments of all parties in an adversary setting, to strike the appropriate balance.

Simply to state the need for meaningful judicial consideration of these questions and thoughtful adjustment of the competing interests is to demonstrate the hopeless inadequacy of the search warrant practice in the First Amendment sphere. A search warrant is issued *ex parte*, upon a presentation (usually by affidavit) to a magistrate. It is executed by law enforcement officers against

12. In light of the 1974 amendment, it has been argued that the search conducted in this case would no longer be permitted under the laws of California. See Note, *supra*, note 6, at 962-71.

13. *Farr v. Superior Court*, 22 Cal.App.3d 60 (1971) held the statute an unconstitutional interference with the judiciary's inherent powers where the information sought related to an apparent violation of court orders by one or more officers of the court. The court did not express an opinion as to the validity or scope of the statute when those special inherent powers were not involved. See 22 Cal.App.3d, at 71 n.5. The reasoning of *Farr* would seem to have no applicability to an ordinary criminal prosecution involving no separation-of-powers issues such as the court thought dispositive in *Farr*.

whom resistance is unlawful. CALIF. PEN. CODE §§ 69, 148; cf. *People v. Curtis*, 70 Cal.2d 347 (1969). A newspaper which is searched has no opportunity to demonstrate to any court that reasons exist why it should *not* be searched. As Mr. Justice Jackson once said: "There is no opportunity for injunction or appeal to disinterested intervention. The citizen's choice is to quietly submit to whatever the officers undertake or to resist at risk of arrest or immediate violence." *Brinegar v. United States*, 338 U.S. 160, 182 (1949) (dissenting opinion).

In contrast, the subpoena process provides an appropriate and important procedural safeguard. Unlike a newspaper faced with officers intent upon executing a warrant to search, the subpoenaed newspaper is not compelled immediately to acquiesce. Instead, it may make a motion to quash and obtain, after an adversary hearing, a judicial determination of the propriety of the subpoena.¹⁴

Where a "shield" law is applicable to the object sought by the police or prosecutor, the execution of a search warrant simply bypasses its protections and denies the newspaper the opportunity lawfully to resist production of protected materials. And where other and possibly less absolute grounds exist, under *Branzburg* or otherwise, to oppose compelled production, a careful sifting and weighing of the facts and circumstances can hardly be expected to occur in the *ex parte* submission of affidavits to a magistrate. It is the exceptional case where the basis for objection is known or at least fully appreciated by the police

14. A California court not long ago observed:

"When police unjustifiably enter an office and seize papers, privacy is irrevocably destroyed. But the issuance and service of a subpoena do not, by themselves, invade the private papers of anyone. If the person having custody of the papers believes the subpoena is defective, . . . he may make a motion to quash the subpoena [citation] or he may refuse to comply and present his excuse when enforcement is attempted against him." (*People v. Warburton*, 7 Cal.App.3d 815, 824 (1970).)

officer or prosecutor seeking the warrant.¹⁵ Even the most conscientious magistrate scarcely can be expected to perceive injuries not disclosed by the affidavits. But the warrant, once issued, cannot lawfully be resisted; and thus the assumption that "the courts will be available to newsmen under circumstances where legitimate First Amendment interests require protection" (*Branzburg v. Hayes*, *supra*, 408 U.S., at 710, Powell, J., concurring) is entirely frustrated. As Mr. Haven, managing editor of the *Los Angeles Times*, put it, "[t]he newspaper first knows about it when the police present the warrant at the office of the newspaper, at which point the newspaper is confronted with the choice of violating a court order or opening its files notwithstanding the disastrous consequences." App. 62-63, at ¶ 5.

In a variety of settings, the Court has condemned *ex parte* court orders which have the effect of significantly impairing First Amendment rights, and has required instead that such orders await an adversary hearing. E.g., *Marcus v. Search Warrant*, 367 U.S. 717 (1961); *A Quantity of Books v. Kansas*, 378 U.S. 205 (1964); *Carroll v. Commissioners of Princess Anne*, 393 U.S. 175 (1968); *Heller v. New York*, 413 U.S. 483, 489-94 (1973). As these cases demonstrate, even a temporary abridgment of First Amendment rights may require a prior adversary hearing;¹⁶ the

15. It would be wholly infeasible to require prosecutors or police officers to demonstrate to a magistrate the *absence* of any grounds for opposition to compelled disclosure of the materials sought, for the nature of the materials and the grounds for asserting confidentiality rarely will be known to them. No such effort was made at the time the warrant was obtained for the search of the *Daily*.

16. *Heller v. New York*, *supra*, does allow a temporary seizure without a prior adversary hearing of a *single copy* of an allegedly obscene film "for the bona fide purpose of preserving it as evidence in a criminal proceeding." *Id.*, at 492. The Court's opinion carefully distinguished this situation from the seizure of a large quantity of films or books which will have the effect of precluding their distribution or exhibition, and approved the holdings of *Marcus* and *Books* which require a prior adversary hearing in such circumstances. The Court stressed that the seizure of even the single copy must be temporary, with a "prompt judicial determination of the obscenity issue in an adversary proceeding" (*id.*) to follow.

present case is stronger for the incontestable reason that any breach of confidentiality resulting from the execution of a search warrant is irreparable and therefore final. And "because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid *final* restraint." *Freedman v. Maryland*, 380 U.S. 51, 58 (1965) (*emphasis added*); *accord*, *Heller v. New York*, *supra*, at 489; *United States v. Thirty-seven Photographs*, 402 U.S. 363, 367 (1971). The compelling need for an opportunity for a newspaper's lawful claims to be heard is wholly denied by a press search:

"The value of a judicial proceeding, as against self-help by the police, is substantially diluted where the process is *ex parte*, because the Court does not have available the fundamental instrument for judicial judgment: an adversary proceeding in which both parties may participate. . . . In the absence of evidence and argument offered by both sides and of their participation in the formulation of value judgments, there is insufficient assurance of the balanced analysis and careful conclusions which are essential in the area of First Amendment adjudication." (*Carroll v. Commissioners of Princess Anne*, *supra*, 183 (1968).)

Because the *ex parte* issuance of a search warrant circumvents the adversary process and frustrates the right to object, on whatever factual or legal ground may be relevant, to the compelled production of materials or information which the newspaper regards as confidential, needless injury to First Amendment interests is encouraged.

2. The Search of a Newspaper Needlessly Breaches the Confidentiality of Unrelated Material Not Sought by the Police But Necessarily Examined in the Execution of the Warrant.

A destructive but inevitable effect of any search of a newspaper is that, in addition to disclosure of needed and unprivileged

evidence, the execution of a warrant exposes to police inspection all other materials in the newspaper's offices. This exposure occurs no matter how confidential and however irrelevant to the police investigation these other items are, and in complete disregard of the Court's admonition that "the First Amendment prevents the Government from using its power to investigate . . . to probe at will and without relation to existing need." *DeGregory v. Attorney General of New Hampshire*, 383 U.S. 825, 829 (1966). In the present case, the unsuccessful search for particular photographs led the police officers to examine the contents of filing cabinets, desks, shelves and wastebaskets, some of which contained journalistic confidences utterly unrelated to the investigation. See note 9, *supra*.

The breach of confidentiality and privacy in this circumstance is entirely unnecessary. A subpoena duces tecum is precise and targeted: those documents which the police have identified and are entitled to obtain will be located by the newspaper and produced; all other documents may remain private.

3. No Legitimate Law Enforcement Interest Is Impaired By Requiring a Subpoena When Evidence Is Sought From a Newspaper.

Petitioners' response to the invocation of the foregoing principles and concerns by the courts below is, to say the least, lame. It consists of nothing more than the usual litany that "if such . . . searches cannot be made, law enforcement will be more difficult and uncertain." *United States v. Di Re*, 332 U.S. 581, 595 (1948). Petitioners do not explain how law enforcement officials have managed to carry out their functions for the better part of this Nation's first 200 years without resorting to the search of a newspaper to obtain evidence of another's crime.¹⁷ They do not explain

17. Although at the time of the decision below the search of the *Daily's* office was thought by the District Court and the parties to be unprecedented in the history of American journalism, regrettably it has since been repeated. Details of these searches are published in the *Press*

why journalists not implicated in the commission of a crime cannot ordinarily be expected to comply voluntarily with a lawful subpoena. Nor do they offer plausible objections to a requirement that, when probable cause exists to believe that a subpoena will not be a satisfactory means for the production of evidence believed to be possessed by a newspaper, such cause must be demonstrated by the submission of sworn evidence to a magistrate. Instead, against the substantial First Amendment considerations which we have canvassed, Petitioners array a variety of objections which, with all respect, border on the chimerical.

Petitioners argue that, under California law, a subpoena duces tecum prior to the filing of a criminal complaint can be issued only by a grand jury.¹⁸ There is, of course, no constitutional

Censorship Newsletter described in note 11, *supra*. See also Note, *supra* note 6, at 957-59.

One such search occurred in Berkeley, California, at the premises of radio station KPFA-FM. Pursuant to a warrant, police searched the station in order to obtain a tape recording received by the station. (Ironically, when the station manager subsequently appeared before a local grand jury, the trial judge ruled that, in view of the California "shield" law (CALIF. EVID. CODE § 1070), the manager did not have to answer any questions going beyond what he had said on a news broadcast. *Newsletter* No. IV, April-May, 1974, at 25 (item 19).)

In October, 1974, Los Angeles police searched radio station KPFK-FM pursuant to a warrant. The search lasted over eight hours and resulted in a search of all the station's files and facilities. *Newsletter* No. VI, at 30 (item 2). We understand that litigation respecting this search is pending.

Radio station KPOO was asked without court order to relinquish a letter received by it and declined to do so. San Francisco police returned the next day with a search warrant and obtained the letter. *Id.*

In addition, there has been a search of the *Los Angeles Star* (*id.*, at 31 (item 4)) and at least two *ex parte* warrants issued for search of the *Berkeley Barb*. *Id.* (item 5).

18. Appellants cite no authority, and in fact the matter is not entirely free from doubt. It is clear that once a criminal complaint is filed a magistrate, district attorney, court clerk, or judge can issue a subpoena. See CALIF. PEN. CODE § 1326. However, CALIF. GOVT. CODE § 12560 gives the Attorney General supervisory power over the sheriffs of the various counties of the State "concerning the investigation . . . of crime", in connection with which he has the power to "direct the service of subpoenas".

barrier to legislation authorizing issuance of a summons or subpoena, for proper investigative purposes, prior to the formal institution of criminal proceedings. See *Hale v. Henkel*, 201 U.S. 43 (1906) (pre-indictment subpoena by grand jury); *Fisher v. United States*, 425 U.S. 391 (1975) (Internal Revenue Service summons); *Beverly v. United States*, 468 F.2d 732 (5th Cir. 1972); cf. *McGarry v. Securities & Exchange Commission*, 147 F.2d 389 (10th Cir. 1945) (administrative subpoena); *Bowles v. Shawano Nat. Bank*, 151 F.2d 749 (7th Cir. 1945), cert. den., 327 U.S. 781 (1946). That the California legislature has not authorized prosecutors to apply to a court¹⁹ for a subpoena in aid of a pending investigation is no justification for resort to the vastly more intrusive and destructive press search employed in this case. Cf. *Davis v. Mississippi*, 394 U.S. 721, 727-28 (1969).

It is said that the subpoena process is insufficiently swift because subpoenas "entail notice and opportunity to challenge" in contrast to warrants which ordinarily are "promptly obtained and executed." Bergna Brief, at 16-17. But subpoenas may, and frequently do, require immediate production of documents or attendance of witnesses. Petitioners offer no explanation why the brief delay which might be necessitated by a motion to quash ordinarily would interfere with the legitimate interests of law enforcement (cf. *United States v. Wilson*, 421 U.S. 309, 318 (1975)); or, if

19. Indeed, in some jurisdictions, prosecutors have the power to issue subpoenas in aid of a criminal investigation. See, e.g., *In Re Blue Hen Country Network, Inc.*, 314 A.2d 197 (Del. 1973). That power was considered in a situation very similar to this case in *In Re McGowan*, 303 A.2d 645 (Del. 1973), where alleged law violations occurred at a demonstration and the police believed that news photographs might reveal the identity of the violator. While the court in that case found, on statutory grounds, that the subpoena was defective, it is clear from the opinion that the use of the subpoena in these circumstances was regarded as a constitutional means of attempting to obtain the information sought. Of course, such subpoenas would be subject to challenge before a neutral and detached court. Compare *Coolidge v. New Hampshire*, 403 U.S. 443, 450-516 (1971); *Mancusi v. DeForte*, 392 U.S. 364, 371 (1968).

such delay would in fact threaten an investigation, why the extraordinary need for immediate action could not be presented to and determined by a magistrate.²⁰

The judgment of the courts below is "troublesome" to some of Petitioners "because, in several respects, the subpoena is less protective of the individual than is the search warrant." Bergna Brief, at 18. Among other things, it is noted that a subpoena need not specify the location of documents, and that the showing which must be made to justify its issuance need not be as extensive. *Id.* It is difficult to know if we are meant to take this seriously. The requisite showing for a subpoena is less rigorous than that required for a search warrant for the very reason that a search is vastly more intrusive than a legal command which may be judicially challenged before compliance is required and which permits the recipient rather than police officers to locate the item sought. Petitioners' professed regard for the search warrant as providing more sensitive protection of the First and Fourth Amendment privacy interests of a newspaper than a subpoena is fanciful and unsupported. See, e.g., Note, *supra*, note 6, at 988-91; Comment, *The Newsman's Privilege After Branzburg: The Case For a Federal Shield Law*, 24 U.C.L.A. L. REV. 160, 183-84 (1976); Note, 86 HARV. L. REV. 1317, 1329 (1973); Comment, *Search Warrants and Journalists' Confidential Information*, 25 AM. UNIV. L. REV. 938, 962-66 (1966).

The crux of Petitioners' concern is that the issuance of a subpoena "is a warning that the criminal evidence is wanted" (Bergna Brief, at 17; emphasis omitted), following which destruction of the evidence may follow. The courts below held, and we quite agree, that where a magistrate is shown probable cause to believe

20. In the rare case where such a showing of urgency could be made, then presumably the use of a subpoena would be "impractical" within the meaning of the judgment below, and a search warrant could be employed.

that a newspaper possessing needed evidence would destroy the evidence despite a subpoena and temporary restraining order, a subpoena would be "impractical" and a search warrant properly could issue. 353 F. Supp., at 133; Petition, App. "C", at 27-28. The decision below is evidently objectionable to Petitioners because it requires the determination of impracticability to be made by a magistrate rather than by prosecutors or police officers. But the whole thrust of our constitutional tradition demands that the basis for a search "be determined by a 'neutral and detached magistrate,' and not by 'the officer engaged in the often competitive enterprise of ferreting out crime.'" *Spinelli v. United States*, 393 U.S. 410, 415 (1969) quoting from *Johnson v. United States*, 333 U.S. 10, 14 (1948); see also *Coolidge v. New Hampshire*, 403 U.S. 443, 449-50 (1971); *Shadwick v. City of Tampa*, 407 U.S. 345, 350 (1972); *Connally v. Georgia*, U.S., 50 L.Ed.2d 444 (1977); *United States v. Chadwick*, U.S., 53 L.Ed.2d 538, 547 (1977).

Petitioners insist, however, that "there will be many instances where, though probable cause to arrest cannot be shown, the apparent non-suspect is in fact the criminal" or at best a "sympathizer" who is likely to "destroy or dispose of the evidence." Bergna Brief, at 17; see also Zurcher Brief, at 18. While this statement seems largely directed to the broader implications of the lower courts' opinions (see Part II, *infra*), the problem at hand concerns a newspaper and not persons about whom the police knew little or nothing. The affidavit furnished to the magistrate in this case *affirmatively* demonstrated that the party to be searched was a newspaper and that the photographs sought were believed to have been taken by members of the *Daily* staff in the ordinary course of their journalistic duties. There was not the slightest reason to suppose that the *Daily* was either a suspect or a "sympathizer." It is unthinkable that the search of a newspaper office might be based upon an unproven suspicion—which

no one troubles to explain, let alone prove, to a magistrate—that the newspaper or its staff might "destroy or dispose of the evidence."²¹

21. Petitioners suggest in their briefs that a subpoena would have been impractical in this case. They refer to an affidavit of Petitioner Brown—not presented to the magistrate, but prepared subsequently for purposes of the litigation in the District Court—which sought to justify the search. In that affidavit, Brown asserted that in 1969 (two years prior to the search in this case), he had attempted unsuccessfully to subpoena photographs believed to be in the possession of the *Daily* and that he felt that certain photographs sought which, although he had never seen them, he nevertheless believed to be incriminating, had been "deleted" from those produced. App. 150. He also referred to a "policy statement" issued by the *Daily* "indicating that it would not retain any potentially incriminating photographs." App. 152. Accordingly, Brown concluded that the *Daily* would "strongly resist any Subpoena Duces Tecum" and would, "if served with such a subpoena, . . . destroy or remove any incriminating photographs from its premises." *Id.* The courts below properly gave no weight to this after-the-fact rationalization.

In the first place, a search warrant cannot be validated by information never presented to the magistrate. See, e.g., *Whiteley v. Warden*, 401 U.S. 560, 564-66 & n. 8 (1971); *Spinelli v. United States*, 393 U.S. 410, 413 n. 3 (1969); *Aguilar v. Texas*, 378 U.S. 108, 109 n. 1, 111-15 (1964); *Giordenello v. United States*, 357 U.S. 480, 486-87 (1958); *Nathanson v. United States*, 290 U.S. 41, 46-47 (1933). Whether Brown's affidavit, if presented to a magistrate, might have been sufficient to demonstrate that a subpoena would have been impractical is therefore not presented on this record.

In any event, the suggestion that the *Daily* would have destroyed evidence or refused to comply with lawful, final court orders is preposterous. The Brown affidavit was based "mainly on hearsay." 353 F. Supp., at 135 n. 16; Petition, App. "C", at 33. Despite Brown's belated contention that the 1969 subpoena was not honored, it appears that no action was taken by his office against the *Daily* or any member of its staff. Surely such action would have been taken if there had been grounds to believe a subpoena had been dishonored. The suggestion that a published editorial indicated that the *Daily* would destroy evidence rather than comply with a subpoena is equally without merit. The editorial to which Brown refers is reprinted at App. 117-18. It described incidents in which, for fear that photographs would be subpoenaed by law enforcement authorities, certain campus groups had excluded *Daily* photographers from meetings. In response to these problems, the *Daily* announced that (1) it intended to cover newsworthy events and would resist efforts to exclude *Daily* news personnel; (2) if any staff members or equipment were harmed, it would press charges; (3) the *Daily* would print newsworthy photographs "regardless of their potential for incrimination"; and (4)

4. A Subpoena Is a Less Drastic Alternative to the Search of a Newspaper Which Must be Utilized Unless Shown to be Impractical.

The essence of the lower courts' decision lies in their recognition that press searches constitute deployment of the proverbial elephant gun to kill a squirrel. In summary, a search is excessive in contrast to a subpoena for several reasons. *First*, it precludes the opportunity for a reasoned judicial determination of the propriety of compelled production of the evidence sought. *Second*, if the evidence sought does not exist, the newspaper's privacy—and that of those who have reposed confidences with it—will be infringed needlessly because police officers instructed to execute a warrant will not be in a position to accept that explanation. *Third*, even if the newspaper is willing to produce such evidence as it possesses, its offices will nonetheless be searched and, for that reason too, its privacy needlessly breached. *Fourth*, a search cannot be confined to inspection of the materials actually sought.

These considerations properly compelled the courts below to invoke the familiar principle that constitutional rights may not be infringed when "less drastic means" are available to accomplish the same legitimate governmental objective:

"[T]he tremendous value that our society places on privacy, indicates that intrusions should take place only when

after publication, it would destroy photographs which might be used in criminal proceedings. The language of the editorial—though in retrospect not as precise as one might wish—left no doubt that the *Daily* meant to announce a policy of routine non-retention of negatives as a means of deterring the issuance of subpoenas, and did not in any way imply an intent to destroy evidence following receipt of a subpoena. Thus, the editorial stated: "Once a story has been printed, pictures taken with it are rarely used again." App. 118. The undisputed evidence was that this editorial policy referred only to materials *not* the subject of a subpoena; that it "is the policy of the *Daily* not to destroy any material covered by a judicially authorized subpoena"; and that, to the knowledge of the affiant, "no such destruction has ever occurred." App. 84. If at the time of the search, Petitioners had entertained the slightest good faith doubt as to whether the *Daily's* published non-retention policy extended to materials after a subpoena had been served, a telephone call would have resolved that uncertainty.

'necessary'. The history and importance of the Fourth Amendment have been well documented. . . . The intrusion from the execution of a warrant—a paramount concern of the Founding Fathers—is simply 'unnecessary' in most situations involving non-suspects, since a 'less drastic means' exists to achieve the same end." (353 F.Supp., at 130-31; see also *id.*, at 135 and n.14; Petition, App. "C", at 22, 32).

This Court has succinctly stated the governing principle: "[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton v. Tucker*, 364 U.S. 479, 488 (1960); see also *Louisiana ex rel. Gremillion v. N.A.A.C.P.*, 366 U.S. 293, 296-97 (1961); *Elfbrandt v. Russell*, 384 U.S. 11, 18 (1966); *N.A.A.C.P. v. Alabama ex rel. Flowers*, 377 U.S. 288, 307-08 (1964); *Aptheker v. Secretary of State*, 378 U.S. 500, 508 (1964); *United States v. Robel*, 389 U.S. 258, 267-68 (1967); *Elrod v. Burns*, 427 U.S. 347, 363 (1976); Note, *Less Drastic Means and the First Amendment*, 78 YALE L.J. 464 (1969). The principle is not confined to the First Amendment setting; indeed, "its origins lie in the area of the commerce clause." Note, 86 HARV. L. REV. 1317, 1322 n.30 (1973). See e.g., *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951); see generally Wormouth & Mirkin, *The Doctrine of the Reasonable Alternative*, 9 UTAH L. REV. 254 (1964). The proposition that the narrowest possible means must be used where constitutional rights are at stake is no stranger to Fourth Amendment cases. See, e.g., *Davis v. Mississippi*, 394 U.S. 721, 727-28 (1969); *Nixon v. Administrator of General Services*, U.S., 53 L.Ed.2d 867, 904 (1977). Indeed, the principle lies at the very heart of the prohibition against an "unreasonable" search. See, e.g., *Terry v. Ohio*, 392 U.S. 1, 20-21, 28-29 (1968); *Sibron v. New York*, 392 U.S. 40, 65-66 (1968); *Cupp v. Murphy*, 412 U.S. 291, 295-96 and

n.2 (1973); *United States v. Chadwick*, U.S., 53 L.Ed.2d 538, 550 (1977). Thus in *Terry* the Court stated:

"In order to assess the reasonableness of [the police officer's] conduct as a general proposition, it is necessary 'first to focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen,' for there is 'no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails.' [citation]" (*Id.*, at 20-21)

And, in striking this balance, "any . . . search [must] be strictly circumscribed by the exigencies which justify its initiation." *Id.*, at 26; see also *Chimel v. California*, 395 U.S. 752, 762-64 (1969).

In this case, in which there is "a convergence of First and Fourth Amendment values" (*United States v. United States District Court*, *supra*, at 313 (1972)), the subpoena is an effective and constitutionally available means by which law enforcement can obtain evidence possessed by newspapers, subject only to whatever objections may lawfully be interposed upon a motion to quash. The judgment of the courts below was that, absent a showing that in the circumstances of a particular case a subpoena directed to a newspaper would be impractical, this "less drastic means" must be pursued. That judgment was correct.

II. In the Circumstances of This Case, the Search of The Stanford Daily Was Unreasonable Within the Meaning of the Fourth Amendment

In the previous section, we have demonstrated the unconstitutionality of police searches of newspapers for evidence. It seems to us unnecessary to go beyond that issue as presented on this record. However, because the briefs of Petitioners and their supporting *amici* largely have ignored the First Amendment conse-

quences of the *Daily* search, and have viewed the case as if their search had been conducted at the home or office of those not engaged in First Amendment activity, we think it appropriate to discuss briefly the constitutionality of the search conducted in this case without regard to the special considerations commanded by the First Amendment.

It will be helpful at the outset to state the position which we espouse. The search for evidence in this case was unreasonable, and therefore condemned by the Fourth Amendment, because it was directed at a party not suspected of crime, and the evidence presented to the magistrate affirmatively showed that (1) the third party to be searched occupied no relationship to any criminal suspect such as would suggest a risk that the evidence might be destroyed; (2) there was no likelihood of destruction arising from the third party's status, demonstrated behavior, or the circumstances by which the evidence sought came to be in its possession; (3) lawful grounds might have existed to resist compelled production of the evidence sought; (4) particularly sensitive privacy interests of the third party (and of others whose confidences were likely to be reflected in documents in its possession) were invaded by a peculiarly intrusive form of search; and (5) there was otherwise no apparent reason shown why a subpoena would be impractical.

The touchstone of the Fourth Amendment is whether under all of the "facts and circumstances" (*Go-Bart Importing Co. v. United States*, 282 U.S. 344, 357 (1931)), a search is "reasonable." As the Chief Justice said only recently, "reasonableness must take into account all the circumstances and balance the rights of the individual with the needs of society." *United States v. Ortiz*, 422 U.S. 891, 900 (1976) (Burger, C.J., concurring). In *South Dakota v. Opperman*, 428 U.S. 364, 373 (1976), the Court recalled Justice Black's statement in *Coolidge v. New Hampshire*, 403 U.S. 443, 509-10 (1971) that "[t]he test of reasonableness

cannot be fixed by per se rules; each case must be decided on its own facts.²² Thus "[t]he ultimate standard set forth in the Fourth Amendment is reasonableness." *Cady v. Dombrowski*, 413 U.S. 433, 439 (1973); see also *Rios v. United States*, 364 U.S. 253, 255 (1960); *Ker v. California*, 374 U.S. 23, 33 (1963); *Wyman v. James*, 400 U.S. 309, 318-19 (1971); *Cooper v. California*, 386 U.S. 58, 59 (1967); *Roaden v. Kentucky*, 413 U.S. 496, 501-02 (1973); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976); *United States v. Chadwick*, ____ U.S. ____, 53 L.Ed.2d 538, 547 (1977). In *Roaden*, as we have noted earlier, a seizure made incident to arrest—and therefore within an established exception to the warrant requirement—was nevertheless held to be "unreasonable" under the circumstances of that case. The Court's observation there that the "Fourth Amendment proscription against 'unreasonable . . . seizures' . . . must not be read in a vacuum" (413 U.S., at 501) is, for similar reasons, applicable to this case.

We do not doubt that courts have the right and power to compel the production of evidence by persons not themselves suspected of criminal activity. As Lord Ellenborough stated long ago: "The right to resort to means competent to compel the production of written, as well as oral, testimony seems essential to the very existence in constitution of a Court of common law." *Amey v. Long*, 9 East 484. But the conventional means of compelling the production of such evidence is a subpoena duces

22. Whether a search conducted without a warrant, and not within any of the recognized exceptions to the warrant requirement, may nevertheless be sustained as "reasonable" has generated considerable disagreement. Compare, e.g., *United States v. Rabinowitz*, 339 U.S. 56 (1950); *South Dakota v. Opperman*, *supra*, with *G.M. Leasing Corp. v. United States*, 429 U.S. 338 (1977); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971). As the search in this case was conducted pursuant to warrant, it is unnecessary to address that question. See generally *South Dakota v. Opperman*, *supra*, at 381-82 (Powell, J., concurring). The question presented here is the converse: whether the search, even though purportedly authorized by a warrant, was reasonable under all the facts and circumstances.

tecum, not a search warrant. In *Wilson v. United States*, 221 U.S. 361 (1911), while acknowledging the longstanding power to compel by subpoena "the production of documents material to the cause, though in the possession of a stranger" (*id.*, at 373, quoting *Summers v. Moseley*, 2 Cr. & M. 477, 4 Tyrw. 158, 3 L. J. Exch. N.S. 128), the Court noted that a subpoena to compel the production of evidence "does not impair any right either of the opposing party or of the person responding to the subpoena . . . of showing under oath the reasons why he should not be compelled to produce the document." *Id.*, at 374 (emphasis added). At the time of the search in this case, there was no authority in the decisions of this or any other federal or state court approving the search for evidence of a person not suspected of crime.²³

A search for evidence often invades particularly sensitive privacy interests even though the third party searched is not engaged in activities entitled to heightened First Amendment protection. While every citizen is entitled to the protections of the Fourth Amendment, privacy interests and expectations are not uniform; some circumstances require greater solicitude than others. *Roaden v. Kentucky*, *supra*, at 501; *United States v. Martinez-Fuerte*, 428 U.S. 543, 561 (1976); *Whalen v. Roe*, ____ U.S. ____, 51 L.Ed.2d 64 (1977). Many of those circumstances in which society's respect for confidentiality ought to be scrupulously honored are especially vulnerable to third-party searches. The files of a lawyer, for example, often may contain information that may be of interest to

23. Those few cases in which courts had dealt with the seizure of evidence from third parties all condemned the practice. *Newberry v. Carpenter*, 107 Mich. 567, 65 (N.W. 530 (1895)); *Owens v. Way*, 82 S.E. 132 (Ga. Sup. Ct. 1914); *Commodity Manufacturing Co. v. Moore*, 198 N.Y. Supp. 45 (1923); *People v. Carver*, 16 N.Y.S. 2d 268 (1939). Recently, a federal Court of Appeals has disagreed. *United States v. Manufacturers National Bank*, 536 F.2d 699 (6th Cir. 1976), cert. den. sub. nom. *Wingate v. United States*, ____ U.S. ____, 50 L.Ed.2d 749 (1977).

law enforcement authorities. Those files may be subpoenaed (see *Fisher v. United States*, 425 U.S. 391 (1976); see also *Couch v. United States*, 409 U.S. 322 (1973)); but the use of a search warrant to achieve their production would expose all of the confidences of the attorney's other clients (to say nothing of the attorney's own work product and personal records) to police scrutiny. Similarly, while bank records of persons under investigations frequently are subpoenaed (see *United States v. Miller*, 425 U.S. 435 (1976); *California Bankers Association v. Schultz*, 416 U.S. 21, 53 (1974)), a search warrant would lay bare to the executing officers the financial confidences of other and unrelated customers of the bank. The same jeopardy to expectations of privacy on the part of persons who never have been and never will be suspected of criminal activity exists if the police are free to conduct third-party searches of the files and records of physicians, psychiatrists, telephone business offices, accounting firms, employment agencies, credit bureaus, large employers, private investigators, security services, or any other place where confidential personal or financial information relating to many persons is routinely kept.

The record in this case contains a chilling example of the potential for mischief. Not long after the District Court's original ruling in this case, some of the Petitioners participated in the search of the patient files of the Psychiatry Clinic of the Stanford Hospital. See pp. _____, *supra*. The object of the search was the patient records of an individual who was the *victim* of a crime. A subpoena had been served; there was no attempt to demonstrate to the magistrate that the psychiatrist to whom it was directed would disregard it; and her counsel was attempting to arrange for a hearing as to its validity. The effect of the search was that, before any judicial determination of whether the records were privileged could be had, the intrusion was completed and the confidential patient records of every patient of the psychiatric unit—which

were of course privileged under California law (see CALIF. EVID. CODE §§ 1010-26; *In re Lifschultz*, 2 Cal. 3d 415 (1970))—were exposed to the scrutiny of the executing officers.

The two major vices of a press search for evidence are also relevant when the search is directed against a non-journalist third party. As noted, the privacy of that person—and of unrelated persons whose confidences are reflected in documents in his or her possession—is needlessly invaded whenever a subpoena would be equally effective to vindicate the needs of law enforcement. And lest there be any doubt as to the degree of that intrusion, it bears emphasis that a search for evidence ordinarily takes the officers executing the warrant into desks, wastebaskets, filing cabinets, closets, and other intimate precincts of the home or office. That, of course, is precisely what occurred in this case. See note 9, *supra*.

The second principal defect of a third party search for evidence is that it wholly denies the opportunity for a judicial determination of whatever grounds may exist to oppose production of the evidence sought. The evidence may be protected by an attorney-client privilege, a physician-patient privilege, or some other statutory, constitutional, or common-law privilege. Reasonable cause for production may be lacking. See, e.g., *United States v. Dionisio*, 410 U.S. 1, 11-12 (1973); *Hale v. Henkel*, 201 U.S. 43, 76-77 (1906). Or it may simply be that, under all the circumstances, a court might find the demand for production unreasonable or oppressive. But a warrant cannot be resisted (see pp. 28-29, *supra*), and whatever objections, whatever privacy interests, and whatever claims to confidential treatment may have existed will be irretrievably lost once it is executed.²⁴

24. In nearly every jurisdiction, there will be no meaningful and available judicial forum for determining the validity of a third party search. The defendant against whom evidence seized in such a search is used will not have standing to challenge the search. See, e.g., *Brown v. United States*, 411 U.S. 223 (1973); *contra*, *Kaplan v. Superior Court*, 6 Cal.3d

The superiority of a procedure which offers an opportunity for a prior determination of the propriety of a proposed, and contested, governmental action against a citizen is obvious. In a variety of settings, the Court has imposed it as a constitutional imperative. See, e.g., *North Georgia Finishing v. Di-Chem*, 419 U.S. 601 (1975); *Board of Regents v. Roth*, 408 U.S. 564, 570 n.7 (1972); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Bell v. Burson*, 402 U.S. 535 (1971). The critical factor in these cases is that "except in emergency situations" (*Bell v. Burson*, *supra*, at 542), the opportunity to be heard must be afforded *before* the adverse governmental action occurs. This is so because "[i]f the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented." *Fuentes v. Shevin*, *supra*, at 81, and cases cited at 82. "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting from *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

It will not do to say that the *ex parte* presentation to a magistrate of affidavits establishing probable cause to believe that an individual is in possession of relevant evidence is a sufficient protection. A hearing on a motion to quash would provide an opportunity for a judicial determination of whatever grounds of objection may exist; but a search warrant issued *ex parte* makes that procedural course impossible. As the Court said in *Fuentes*:

150 (1971). Even a "vicarious" exclusionary rule affords no relief to the third party whose privacy was invaded. While it is true that in theory a suit for damages might be brought if the warrant was invalid, the inadequacies of that remedy are by now well-known, not the least of which is the absolute immunity claimed by prosecutors (see *Imbler v. Pachtman*, 424 U.S. 409 (1976) and the qualified immunity applicable to police officers who acted in good faith (see *Pierson v. Ray*, 386 U.S. 547 (1967)).

"The purpose of this requirement [of a prior opportunity to be heard] is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary enroachment—to minimize substantively unfair or mistaken deprivations of property. . . . So viewed, the prohibition against the deprivation of property without due process of law reflects the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference. [citation]

"The requirement of notice and an opportunity to be heard raises no impenetrable barrier to the taking of a person's possessions. But the fair process of decisionmaking that it guarantees works, by itself, to protect against arbitrary deprivations of property. For when a person has an opportunity to speak up in his own defense, and when the State must listen to what he has to say, substantively unfair and simply mistaken deprivations of property interests can be prevented. It has long been recognized that 'fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights. . . . [And n]o better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.' [citation]" (407 U.S., at 80-81.)

See also *Alderman v. United States*, 394 U.S. 165, 183-84 (1969).

The need in the present context for a meaningful opportunity to be heard is far more compelling than in the cases involving challenges to pre-judgment remedies such as attachment. Those cases arise in the context of a dispute between two parties, as to which the state provides a neutral mechanism for its resolution. In those situations, despite the force of the argument for an opportunity to be heard *before* adverse action is taken, the rights of the creditor may be significantly prejudiced by the delay. See *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974). Moreover, if the temporary deprivation of property proves to have

been unwarranted, it can be returned; and there are available means, such as bonding, for providing redress to the individual wrongly deprived of his property for a period. See *id.*, at 610, 616-18. In the case of a search warrant issued *ex parte* and directed against a third party not suspected of crime, the state is not neutral but a party to the controversy. At least where there is no likelihood of non-compliance and destruction of the evidence sought, it will not be prejudiced if the third party is afforded an opportunity to be heard before the evidence is produced. Moreover, and most fundamentally, more is at stake than a *temporary* deprivation of one's property: execution of a search warrant results in an irreparable invasion of privacy, for there will be no means of undoing the breach of that privacy should it later be determined that the search was not legally justified.

These principles yield, as they must, in the case of search warrants directed at persons suspected of crime. A prior adversary hearing, of course, ordinarily would be impractical since it can be presumed that "a criminal will destroy or hide evidence or fruits of his crime if given any prior notice." *Fuentes v. Shevin*, *supra*, at 93-94 n.30 (1972). Petitioners urge that, in some circumstances, there is also a danger that a third party possessing evidence will destroy or conceal it following issuance of a subpoena. But surely there is no significant risk that a bank, a lawyer, an accountant, a physician, a psychiatrist, or a newspaper—*itself* not suspected of crime—will "destroy or hide evidence." Such persons may have reasonable grounds lawfully to resist a subpoena by obtaining a judicial determination of its validity, but they cannot be presumed likely to flout the law once that determination is rendered. Such a case is a far cry from a situation where "the person subpoenaed may be a friend, a relative, or a criminal associate of the perpetrator . . . [who] may be highly motivated to destroy evidence linking the criminal to the crime." Brief of the National District Attorneys Association et al., at 17;

see *United States v. Manufacturers National Bank*, *supra* note 23. When an application for a search warrant affirmatively demonstrates that its object would no. likely disregard a subpoena or destroy evidence, Petitioners' concerns are simply inapplicable, and the magistrate's issuance of a warrant is plainly unreasonable because a "less drastic means" (see pp. 39-40, *supra*)—a subpoena—should be utilized. See Note, 86 HARV. L. REV. 1317, 1330-31 (1973).

These considerations coalesce in this case to render the *Daily* search unreasonable. *First*, the police knew—and the materials submitted to the magistrate affirmatively showed—that the *Daily* occupied no relationship to the persons who were being investigated. To the contrary, the *Daily* was thought to possess useful evidence precisely because it was engaged in an independent, arms'-length activity: gathering and reporting of news. *Second*, substantial grounds existed then²⁵ and exist now²⁶ for objection to the compelled production of the evidence sought. *Third*, particularly sensitive privacy interests of the *Daily*, and of persons whose confidences were reflected in its files and notes, were threatened by execution of the search warrant. *Fourth*, the magistrate was provided with *no* evidence tending to suggest that the *Daily* might disregard a subpoena or destroy the evidence. In these circumstances, the search was constitutionally "unreasonable."²⁷

25. At the time of the search, both the District Court and the Court of Appeals for the Ninth Circuit had found a constitutional privilege applicable to confidential information in the possession of journalists. See *Caldwell v. United States*, 434 F.2d 1081 (9th Cir. 1970), *reversed*, 408 U.S. 665 (1972).

26. Apart from any federal constitutional grounds for objecting to production, the materials now plainly are protected by Section 1070 of the California Evidence Code. See pp. 27-28, *supra*.

27. Petitioners cite a number of cases for the proposition that "warrantless searches are the norm in third-party cases" (Zurcher Brief, at 32-33). Contrary to Petitioners' view of them, these cases reinforce our contention that the search in this case was unnecessary and therefore "un-

III. The Granting of Declaratory Relief as to the Police Officer Defendants Was Proper

The police officer defendants contend that they are immune from suit under 42 U.S.C. § 1983 because their search of the *Daily* was performed in good faith, "in full compliance" with "then existing law." Zurcher Brief, at 35; but see note 25, *supra*. This insupportable assertion amounts to the bald proposition that Section 1983 can never be a vehicle for deciding constitutional questions of "first impression," since, in so doing, relief is granted

reasonable" under Fourth Amendment standards. The lower court cases upholding airport screening procedures (e.g., *People v. Hyde*, 12 Cal.3d 158 (1974)) permit no greater intrusion of privacy than is necessary to protect against a serious threat to life and property; thus "[p]reboarding inspections must be confined to minimally intrusive techniques designed solely to disclose the presence of weapons or explosives." *Id.*, at 168. *Camera v. Municipal Court*, 387 U.S. 523 (1967) permits an inspection by municipal health or housing inspectors without a showing of probable cause to believe that there have been criminal law violations for the self-evident reason that the purpose of the inspection is civil. *Camera* does require a warrant and a showing of probable cause with respect to both the area being searched and selection of specific structures within it. 387 U.S., at 538-39. The decision thus requires as specific a showing of necessity as can feasibly be given. In each of these situations, then, the intrusion which is permitted is necessary to further important public interests relating to safety or health and is no greater than that necessary to achieve its purpose; no "less drastic means"—such as a subpoena—is available.

Equally inapposite are the "regulated business" cases, which authorize routine inspections without warrant or probable cause of enterprises, such as liquor or gun vendors, which "pose only limited threats to the dealer's justifiable expectations of privacy" because such businesses which choose "to engage in [a] pervasively regulated business . . . do so with the knowledge that [their] business records [and premises] will be subject to effective inspection." *United States v. Biswell*, 406 U.S. 311, 316 (1972); see also *Almeida-Sanchez v. United States*, 413 U.S. 266, 270-72 (1973). A newspaper is the antithesis of a regulated enterprise. See, e.g., *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974); see also *id.*, at 259 (White, J. concurring).

Finally, little need be said of the reference to the warrantless search without probable cause of "persons and objects crossing our international borders." Zurcher Brief, at 33. The offices of the *Daily* are a good distance from any international boundary, and the border search exception plainly does not reach as far as Palo Alto. See *Almeida-Sanchez v. United States*, *supra*, at 272-74; *United States v. Ortiz*, 422 U.S. 891 (1975).

"without fault" in cases where defendants may have been acting in good faith. *Id.* at 35, 38 n.22.

Not surprisingly, no cases are cited for this remarkable conclusion. This Court has never held or even intimated that the conduct of police officers or other public officials not provably in bad faith is beyond the scrutiny of courts in cases seeking injunctive or declaratory relief. To the contrary, an unbroken line of decisions from *Ex Parte Young*, 209 U.S. 123 (1908) to *Linmark Associates, Inc. v. Township of Willingboro*, ___ U.S. ___, 52 L.Ed.2d 155 (1977) allows injunctive relief (to say nothing of the less drastic remedy of declaratory relief afforded in this case) against the unconstitutional acts of government officials regardless of the defendants' subjective "good faith" or whether they could be held accountable for money damages. See *Illinois v. City of Milwaukee*, 406 U.S. 91, 108 n.10 (1972) (sovereign immunity against damages does not bar injunctive relief). As the Court of Appeals said, "[e]xtension of [the qualified immunity] rule to suits like the present one, seeking injunctive and declaratory relief, has been rejected by the courts." Petition, App. "A", at 3, citing *Rowley v. McMillan*, 502 F.2d 1326, 1332 (4th Cir. 1974); *Hodge v. Henrick*, 391 F.Supp. 91 (E.D. Va. 1975), *Wood v. Strickland*, 420 U.S. 308, 315 n.6 (1975); *National Treasury Employees Union v. Nixon*, 492 F.2d 587, 609 (D.C. Cir. 1974); *Gouge v. Joint School Dist. No. 1*, 310 F.Supp. 984, 990 (W.D. Wis. 1970); *Richmond Black Police Officers Ass'n v. City of Richmond*, 386 F.Supp. 151, 154 (E.D. Va. 1974); *Saffron v. Wilson*, ___ F.Supp. ____ (D.D.C. decided Jan. 2, 1975); *Safeguard Mutual Ins. Co. v. Miller*, 472 F.2d 732, 734 (3d Cir. 1973). In addition to the cases cited by the Court of Appeals, see *Peek v. Mitchell*, 419 F.2d 575, 578 (6th Cir. 1970); *United States v. Clark*, 249 F.Supp. 720, 727 (S.D. Ala. 1965).

Petitioners' misguided focus on their alleged good faith leads them to several erroneous conclusions. They assert, for example,

that they are immune from suit because they were merely executing a judicially-issued search warrant. *Zurcher Brief*, at 35-39. As the Court of Appeals noted, this claim was not timely presented to the District Court. Petition, App. "A", at 2. Moreover, it does not apply to Petitioner Peardon who, like Petitioner Brown, participated in applying for the warrant. App. 22-25. In any event, although the good-faith execution of a warrant would immunize these petitioners from an award of damages—which were neither sought nor obtained in this case—no reasoned explanation or authority is offered for the indigestible proposition that courts can neither enjoin unconstitutional police conduct nor declare rights for the future simply because a defendant's unconstitutional conduct was in accordance with then-existing state law or court order.²⁸ If petitioners were correct, this Court could not have granted injunctive relief against school officials who, as required by state statutes (and as formerly authorized by decisions of this Court), operated dual school systems segregated by race. *Brown v. Board of Education*, 347 U.S. 483 (1954).

It makes little difference whether conduct challenged as unconstitutional was specifically required by state statute or authorized by state judicial authority, for, in either case, the paramount claims of federal law must prevail. *N.L.R.B. v. Nash-Finch Co.*, 404 U.S. 138 (1971); *Ex Parte Young*, *supra*. The suggestion that

28. The cases cited by Petitioners for the proposition that police officers in such circumstances are absolutely immune from suit do not support it. *Rhodes v. Houston*, 202 F.Supp. 624 (D. Neb. 1962), *aff'd*, 309 F.2d 959 (8th Cir. 1962), *cert. den.*, 383 U.S. 971 (1966) finds immunity from damages but bases the denial of injunctive relief (against future incarceration of a state prisoner) on other grounds. *Steinpreis v. Shook*, 377 F.2d 282 (4th Cir. 1967), *cert. den.*, 389 U.S. 1057 (1968) is hopelessly miscited, for it deals only with immunity from an award of damages. *Mackay v. Nesbett*, 285 F.Supp. 498 (D. Alaska 1968); *Atchley v. Greenhill*, 373 F.Supp. 512 (S.D. Tex. 1974); and *Hill v. McClennan*, 490 F.2d 859 (5th Cir. 1974), cited in *Zurcher Brief*, at 37, establish the unremarkable proposition that one may not litigate the validity of a state court decision by suing the state court judge in federal court under Section 1983.

state court judges or those acting under their commands are absolutely immune from federal injunctive or declaratory relief, even though other equitable prerequisites are met, flies in the face of the numerous decisions which have authorized such relief, as well as the explicit recognition in 28 U.S.C. § 2283 that federal restraint of judicial proceedings is permissible in limited circumstances. See, e.g., *Timmerman v. Brown*, 528 F.2d 811 (4th Cir. 1975); *Mitchum v. Foster*, original order granting temporary restraining order unreported, (N.D. Fla. 1970), *injunction dissolved*, 315 F.Supp. 1387, *reversed*, 407 U.S. 225 (1972); *Pugh v. Rainwater*, 332 F.Supp. 1107 (S.D. Fla. 1971), 336 F.Supp. 490 (1972), 355 F.Supp. 1286 (1973), *affirmed in part, vacated in part*, 483 F.2d 778 (5th Cir. 1973), *affirmed in part, reversed in part sub. nom. Gerstein v. Pugh*, 420 U.S. 103 (1975); *Medrano v. Allee*, 347 F.Supp. 605, 611 (S.D. Tex. 1972), *affirmed in part, vacated in part and remanded*, 416 U.S. 802 (1974); *Tucker v. City of Montgomery Board of Commissioners*, 410 F.Supp. 494 (M.D. Ala. 1976). Indeed, in *Hadnott v. Amos*, 394 U.S. 358 (1969), the Court ordered the federal district court to issue injunctive relief against a state probate judge who, as part of his statutory responsibilities, prepared election ballots. See also *Littleton v. Berbling*, 468 F.2d 389 (7th Cir. 1972), *cert. den.*, 414 U.S. 1143 (1974) (injunction against state judges not barred by absolute immunity from damages); *Person v. Association of Bar of City of New York*, 554 F.2d 534 (2d Cir. 1977), *cert. den.*, _____ U.S. _____, 46 U.S.L.W. 3293 (1977), and cases cited. Of course, no order was entered against any judge in this case, and no injunction was entered against anybody.²⁹

29. Petitioner *Zurcher* also argues that because he assertedly did not personally participate in the search of the *Daily*, he may not be made a defendant in an action for injunctive or declaratory relief. The contention, of course, is inapplicable to the four police officers who conducted the search, or to District Attorney Brown and officer Peardon, who obtained the warrant. In any event, this contention is without merit. [footnote continued]

IV. The Award of Fees Was Authorized by the Civil Rights Attorney's Fees Awards Act of 1976

The Court of Appeals affirmed the District Court's award of attorneys' fees under the authority of the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988, last sentence ("the Act"). The avowed legislative purpose in enacting the Act was to "remedy anomalous gaps in our civil rights laws created by the . . . recent decision in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975) . . ." (S.Rep. No. 94-1011, 94th Cong., 2d Sess., at 1 (hereafter "S.Rep.")). so that "private citizens [will] be able to assert their civil rights. . . ." *Id.* at 2. The Act was "designed to give . . . persons effective access to the judicial process where their grievances can be resolved according to law." H.R. Rep. No. 94-1558, 94th Cong., 2d Sess., at 1 (hereafter "H.R. Rep.")).

Zurcher is the Chief of Police of the City of Palo Alto. The issue of his alleged non-involvement was not raised in the District Court before summary judgment was granted, and the record contains no evidence substantiating that claim. The Court of Appeals therefore held that the point was untimely. Petition, App. "A", at 2. Moreover, the search was conducted by Zurcher's subordinates, whose authority derives from him, and whose past conduct was and future conduct will be subject to his direction. Zurcher's alleged non-participation would doubtless be relevant to the question of damages, but here the District Court awarded no damages and, indeed, even refrained from issuing an injunction. It merely declared the rights of the *Daily* in relation to the District Attorney and the Palo Alto Police Department, and it was in that connection that Chief Zurcher was properly named as a defendant. *Lankford v. Gelston*, 364 F.2d 197, 205 (4th Cir. 1966); *Hernandez v. Noel*, 323 F.Supp. 779, 783 (D. Conn. 1970); *Houser v. Hill*, 278 F.Supp. 920, 928-29 (M.D. Ala. 1968); *Cottonreader v. Johnson*, 252 F.Supp. 492, 499 (M.D. Ala. 1966).

Petitioner Zurcher's invocation of *Rizzo v. Goode*, 423 U.S. 362 (1976) is similarly misplaced. In *Rizzo*, the Court found that a District Court injunction significantly revising the internal procedures of the Philadelphia Police Department exceeded the court's equitable power, at least where the named defendants had not themselves been implicated in the constitutional violations giving rise to the District Court's remedy.

The present case could not be more different. Here, of course, the District Court refrained from issuing any injunction and *Rizzo's* admonition

Petitioners nevertheless argue that the Act should not have been applied to this case, which was pending on appeal to the Court of Appeals at the time of the Act's passage. They further urge that fees in a declaratory judgment action may not be awarded against a defendant who enjoys absolute immunity from an award of money damages, or who enjoys qualified immunity from damages unless there has been a finding that he acted in bad faith. These contentions find no support in the text of the Act or its legislative history.

A. CONGRESS INTENDED THE ACT TO APPLY TO PENDING CASES.

Congress unmistakably demonstrated its intent that the Act apply to pending cases and authorize the award of fees for services rendered prior to the Act's effective date. The Report of the House Judiciary Committee unambiguously states:

"In accordance with applicable decisions of the Supreme Court, the bill is intended to apply to all cases pending on

against federal courts "inject [ing them] selves by injunctive decree into the internal . . . affairs of [a] State agency" (*id.* at 380) is therefore totally inapplicable. By contrast, the Court has long recognized that declaratory relief may issue where considerations of federalism and comity might render injunctive relief inappropriate. *Texas v. Florida*, 306 U.S. 398, 412 (1939); *Steffel v. Thompson*, 415 U.S. 452, 462-3 and n.12 (1974); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975). Moreover, nothing in *Rizzo* called into question the long line of cases commencing with *Ex Parte Young*, *supra*, in which senior prosecutorial or police officials are sued to restrain enforcement of unconstitutional statutes; it is common in such cases to sue the Attorney General (as was the case in *Ex Parte Young*), the police chief (as in *Steffel v. Thompson*, *supra*), or the District Attorney (as in *Doran v. Salem Inn, Inc.*, *supra*), even though such persons did not pass the law which is challenged and were presumably acting in good faith. Finally, in *Rizzo*, the named defendants had neither authorized nor ratified the random unconstitutional conduct of their subordinates not named as defendants; here, by contrast, the District Court was confronted with a District Attorney's office and a police department which asserted, as a matter of constitutional law, the right to conduct searches of the press for evidence. The difference between *Rizzo* and this case is the difference between isolated individual, unauthorized conduct and official policy.

the date of enactment as well as all future cases. *Bradley v. Richmond School Board*, 416 U.S. 696 (1974)." (H.R. Rep., at 4 n.6).

This same point was made without objection in both the House³⁰ and Senate³¹ debates. Moreover, on the floor of the House, a motion to recommit the bill, offered by Congressman Ashbrook for the purpose of obtaining an amendment to make the Act prospective only, was defeated by a vote of 268-104. See 122 CONG.REC. H12166 (Oct. 1, 1976).

Petitioners argue that the application of the Act to cases pending on appeal works a "manifest injustice" under *Bradley v. Richmond School Board*, 416 U.S. 696 (1974). *Bradley*, of course, held that legislation authorizing attorneys' fees in Title VI cases was retroactive, and found no "manifest injustice" in doing so. *Bradley* does not suggest that a court's perception of unfairness might override a clear legislative intent: rather, the rule it articulates governs where, as in that case, the legislative will on the question of retroactivity was uncertain. See *id.*, at 716 and n.23. Here, as already shown, Congress intended with unmistakable clarity that the Act apply retroactively to pending cases. Petitioners do not contend that application of the Act to pending cases is in some way unconstitutional.

In any event, this case involves anything but "manifest injustice." At the very outset, the complaint filed in this case sought attorneys' fees. App. 30. For nearly the entire time that it was pending in the District Court, the rule prevailing in the Northern District of California allowed for an award of attorneys' fees on the "private attorney general" theory. See, e.g., *La Raza Unida v. Volpe*, 57 F.R.D. 94 (N.D. Calif. 1972). While the

30. See 122 CONG.REC. H12155 (Cong. Anderson); *id.*, at H12160 (Cong. Drinan).

31. 122 CONG.REC. S17052 (Sen. Abourezk).

matter was still before the District Court, the Court of Appeals for the Ninth Circuit, in common with decisions of numerous lower federal courts around the country, approved the rule of the *La Raza* case and held that attorneys' fees could be awarded in Civil Rights Act suits. *Brandenburger v. Thompson*, 494 F.2d 885 (9th Cir. 1974). While the *Daily* case was pending on appeal, *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975) disapproved the rule of those cases. *Alyeska* in turn prompted Congress to reinstate the law, as it existed at the time the District Court entered judgment in this case. Petitioners' expectations can, therefore, hardly be said to have been frustrated by the passage of the Act.³²

Petitioners also view the fee award in this case as a "manifest injustice" because it imposes a financial exposure upon "individuals and . . . not publicly funded governmental entities . . ." Zurcher Brief, at 43. Were that statement true, their quarrel

32. Petitioners' complaints that a "sanction" has been imposed upon them "for performing duties legal at the time" (Zurcher Brief, at 14) and that the award of fees "will result in a chilling effect on [the] diligent search for relevant evidence" (Bergna Brief, at 29) are without basis in fact. While it is true that at the time of the search, the entitlement of a prevailing plaintiff in a Civil Rights Act suit to an award of fees was uncertain, no part of the award is either punishment or compensation for the actions of Petitioners on the date of the search. Rather, the fee award stems from the subsequent decision of Petitioners—essentially a continuing one—to contest this suit and to insist, as Petitioners Bergna, et al., did in their pleadings, that should the occasion be presented in the future they would again conduct a search of the type which prompted this action. App. 38, at ¶ 9.

This distinction—between penalties or damages for primary conduct, on the one hand, and an award of fees incurred in litigation to determine the legality of that conduct, on the other—is a significant one which Petitioners overlook. See Comment, *Awarding Attorneys Fees Against A State Official Sued in His Official Capacity After Edelman v. Jordan*, 55 BOSTON U.L.REV. 228 (1975). It is for that reason that the Act expressly provides that the fee award will be treated "as part of the costs." See S. Rep., at 5 & n.6 (1976) (hereafter "S. Rep."); see also *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (Stevens, J., concurring) (fees are costs and thus not within Eleventh Amendment bar to damage recovery from a State).

would lie with Congress. But the specter of modestly paid governmental employees being compelled to bear the fee award in this case is altogether false. Petitioners surely have not forgotten that, as the District Court found (see Petition App. "D", at 52), under California law both the costs of defense and any fee award must be paid by the public entity which employed the public employees against whom the award is made where, as in this case, they were acting within the scope of their employment. CALIF. GOVT. CODE § 825.³³ Thus, the City of Palo Alto and the County of Santa Clara—not Petitioners—ultimately will bear these costs.³⁴

Thus, the Court of Appeals was entirely correct in applying the Act to the present case. Its judgment conforms with decisions of every other federal court which has considered the question of whether Congress intended the Act to apply to all active pending cases and to services rendered before, as well as after, its passage. See, e.g., *Alicia Rosado v. Garcia Santiago*, 562 F.2d 114 (1st

33. That the California indemnity statute is applicable to Civil Rights Act suits so that "the public, and not the individual officer, will bear the responsibility for litigation and pay any judgment for attorney's fees" (Petition, App. "D", at 53) is now settled; recently, the California Supreme Court expressly held the indemnification provisions applicable to Section 1983 actions against police officers, relying upon and citing with approval the District Court's analysis in the *Stanford Daily* case. *Williams v. Horvath*, 16 Cal.3d 834, 846-47 (1976).

Thus this case does not require consideration of whether, in the absence of an express indemnification statute, the federal court has the power under the Act to direct that the fee award be paid from public funds. See note 36, *infra*; *Finney v. Hutto*, 548 F.2d 740 (8th Cir. 1977), cert. granted, U.S., 46 U.S.L.W. 3256 (Oct. 17, 1977), now before this court as 76-1660; compare *Skehan v. Board of Trustees of Bloomsburg State*, 436 F.Supp. 657, 666-67 (M.D. Pa. 1977).

34. To state that the fee award "would only serve to punish" Petitioners (Zurcher Brief, at 42) is an indulgence. It imposes no burden on Petitioners at all, and merely allocates the cost of litigating this case on their employer—the unsuccessful litigant—in accordance with a Congressional determination that private citizens should not have to bear the expense of successfully vindicating rights secured to them by the Constitution.

Cir. 1977); *Seals v. Quarterly County Court*, 562 F.2d 390 (6th Cir. 1977); *Wharton v. Knefel*, 562 F.2d 550 (8th Cir. 1977); *Gates v. Collier*, 559 F.2d 241 (5th Cir. 1977); *Gay Lib v. University of Missouri*, 558 F.2d 848 (8th Cir. 1977); *Hodge v. Seiler*, 558 F.2d 284 (5th Cir. 1977); *Beazer v. New York City Transit Authority*, 558 F.2d 97 (2d Cir. 1977); *Bond v. Stanton*, 555 F.2d 172 (7th Cir. 1977); *Cuneo v. Rumsfeld*, 553 F.2d 1360 (D.C. Cir. 1977); *Finney v. Hutto*, *supra* note 33; *Rainey v. Jackson State College*, 551 F.2d 672 (5th Cir. 1977); *Martinez Rodriguez v. Jimenez*, 551 F.2d 877 (1st Cir. 1977); *Wade v. Mississippi Co-Op Extension Service*, 424 F.Supp. 1242 (N.D. Miss. 1976); *Gary W. v. State of Louisiana*, 429 F.Supp. 711 (E.D. La. 1977); *White v. Crowell*, 434 F.Supp. 1119 (W.D. Tenn. 1977); *Schmidt v. Schubert*, 433 F.Supp. 1115 (E.D. Wisc. 1977).

B. THE ACT DOES NOT APPLY COMMON LAW IMMUNITIES TO FEE AWARDS AND DOES NOT REQUIRE A SHOWING OF "BAD FAITH" AS A CONDITION OF AWARDING FEES.

Petitioners Bergna and Brown argue that the absolute immunity of prosecutors from money damages (*Imbler v. Pachtman*, 424 U.S. 409 (1976)) likewise bars an award of attorneys' fees. Bergna Brief, at 26-31. Petitioners Zurcher, et al., apparently contend that police officers carrying out official orders also enjoy absolute immunity from fees. Zurcher Brief, at 36-38. Alternatively, it is argued that fee awards against police officers cannot be made where the defendants acted "in good faith" (e.g., Brief of Americans for Effective Law Enforcement, Inc., at 9-13); this would extend to the Act a qualified immunity against fee awards. Cf. *Pierson v. Ray*, 386 U.S. 547, 555-58 (1967). In short, Petitioners apparently contend that, in passing the Civil Rights Attorney's Fees Awards Act of 1976, Congress silently intended to embody in it all immunities applicable to money damages, thereby wholly exempting those, such as judges and prosecutors,

with absolute immunity, and limiting the availability of fee awards as to others, such as police officers (*Pierson v. Ray, supra*), school officials (*Wood v. Strickland*, 420 U.S. 308 (1975)), and executive officers (*Scheuer v. Rhodes*, 416 U.S. 232 (1974)), to cases in which the defendants have acted in bad faith.

Petitioners seek an interpretation of the Act which would render this legislation literally meaningless, and which is demonstrably incorrect. As they construe the Act, it could not be applied at all to those with absolute immunity; and, as for defendants with only qualified immunity, it would modify the pre-Act law not one whit, for even without specific legislation the courts had uniformly asserted the power to award attorneys' fees in "bad faith" cases. Petitioners' interpretation is wholly inconsistent with the legislative history and at odds with lower court authority in attorneys' fees cases decided both prior and subsequent to the enactment of the Civil Rights Attorney's Fees Awards Act of 1976.

1. The question of whether attorneys' fees may be awarded to the prevailing plaintiff in a Civil Rights Act suit against a defendant who is absolutely immune from liability for money damages or, as to others, without a finding of "bad faith", is solely one of legislative intent.³⁵ None of this Court's decisions

35. It is plain that the Eleventh Amendment poses no barrier to this award of attorneys' fees, and Petitioners do not contend otherwise. In the first place, its immunity extends only to actions against a State and not to suits against municipalities or counties. See, e.g., *Lincoln County v. Luning*, 133 U.S. 529 (1890); *Edelman v. Jordan*, 415 U.S. 651, 667 n.12 (1974); *Incarcerated Men of Allen County Jail v. Fair*, 507 F.2d 281, 287 (6th Cir. 1974). In this case, the defendants were all employees of either the County of Santa Clara or the City of Palo Alto. Moreover, this Court held in *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) that actions brought under civil rights laws enacted pursuant to the Congressional authority conferred by Section 5 of the Fourteenth Amendment may be maintained "which are constitutionally impermissible in other contexts." *Id.*, at 456. The Court specifically held that, in such circumstances, the Eleventh Amendment does not preclude an award for attorneys' fees. The Civil Rights Attorney's Fees Awards Act of 1976 was unquestionably founded upon Section 5 of the Fourteenth Amendment. See, e.g., S. Rep., at 5; H.R. Rep., at 7 n.14. Every court which has considered the issue has

finding either an absolute or a qualified immunity against money damages has ever held that such immunity was constitutionally compelled or that Congress was without power to legislate a broader exposure. See *Tenney v. Brandhove*, 341 U.S. 367, 372 (1951); *Pierson v. Ray, supra*; *Wood v. Strickland, supra*; *Scheuer v. Rhodes, supra*; *O'Connor v. Donaldson*, 422 U.S. 563, 576-77 (1975); *Imbler v. Pachtman, supra*. Thus in *Pierson v. Ray, supra*, at 554, the Court found that "[t]he legislative record gives no clear indication that Congress meant to abolish wholesale all common-law immunities." As the Court recently said, "*Tenney v. Brandhove, supra*" squarely presented the issue of whether the

held that fee awards authorized by the Act against state officers are not barred by the Eleventh Amendment. E.g., *Bond v. Stanton*, 555 F.2d 172 (7th Cir. 1977); *Finney v. Hutto, supra* note 33; *Rainey v. Jackson State College*, 551 F.2d 672 (5th Cir. 1977); *Martinez Rodriguez v. Jimenez*, 551 F.2d 877 (1st Cir. 1977); *Wade v. Mississippi Co-op Extension Service*, 424 F.Supp. 1242 (N.D. Miss. 1976); *Gary W. v. State of Louisiana*, 429 F.Supp. 711 (E.D. La. 1977); but cf. *Skehan v. Board of Trustees of Bloomsburg State, supra*, at 667.

Petitioner Bergna argues that to the extent the Act imposes liability for attorneys' fees on prosecutors with absolute immunity against damages, Congress exceeded its power under Section 5 of the Fourteenth Amendment. Bergna Brief, at 33-35. Understandably, no case is cited to support that crabbed view of Congressional power to enforce the Fourteenth Amendment. *Fitzpatrick v. Bitzer, supra*, refutes that contention:

"[P]rinciple[s] of state sovereignty . . . are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment. In that section Congress is expressly granted authority to enforce 'by appropriate Legislation' the substantive provisions of the Fourteenth Amendment, which themselves embody significant limitations on state authority. When Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority. We think that Congress may, in determining what is 'appropriate legislation' for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts."

427 U.S., at 456; see also *Katzenbach v. Morgan*, 384 U.S. 641 (1966); *Ex Parte Virginia*, 100 U.S. 339 (1880).

Reconstruction Congress had intended to restrict the availability in § 1983 suits of those immunities which historically, and for reasons of public policy, had been accorded to various categories of officials." *Imbler v. Pachtman*, *supra*, at 417-18. Yet Petitioners advance their theories of immunity in disregard of the legislative history of the Act and without attempting to address the controlling question of Congress' intent.

2. Petitioners' interpretation of the Act, which would permit the award of attorneys' fees only in cases involving "bad faith" where a qualified immunity against money damages might also be overcome, reduces this remedial legislation to a codification of the status quo. The Act was responsive to this Court's decision in *Alyeska*, in which the Court acknowledged that, even in the absence of legislative direction,

"a court may assess attorneys' fees . . . when the losing party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons' [citations] These exceptions are unquestionably assertions of inherent power in the courts to allow attorneys' fees in particular situations, unless forbidden by Congress." (421 U.S., at 258-59).

See also *Hall v. Cole*, 412 U.S. 1, 5 (1973); *F. D. Rich Co. v. Industrial Lumber Co.*, 417 U.S. 116, 129 (1974); *Runyon v. McCrary*, 427 U.S. 160, 182-84 (1976); *Sims v. Amos*, 340 F.Supp. 691, 694 (M.D. Ala.), *aff'd*, 409 U.S. 942 (1972) (per curiam); 6 MOORE'S FEDERAL PRACTICE § 54.77[2]. Petitioners' interpretation of the Act contracts the law governing fee awards in regard to defendants with absolute immunity from money damages (by denying judicial power to award fees in bad faith cases), and treats the Act as no more than a codification of the *status quo* in regard to all others. That view could be sustained only by ignoring its obvious legislative purpose.

Not a word of the extensive legislative history of the Act supports the Petitioners' construction, which perhaps explains their

disinclination to address it.³⁶ To the contrary, the record documents Congress' intention to go well beyond the "bad faith" exception acknowledged in *Alyeska*,³⁷ and to authorize the award of fees to prevailing plaintiffs in the usual—not the exceptional—case. Thus the Senate Judiciary Committee said:

"It is intended that the standards for awarding fees be generally the same as under the fee provisions of the 1964 Civil Rights Act. A party seeking to enforce the rights protected by [the Act], if successful, 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.' *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968)." (S. Rep., at 4)

The legislative intent that fees be awarded as to defendants who might be immune from an award of money damages, and even though "bad faith" had not been shown, was stated explicitly in the House Judiciary Committee's Report:

36. The closest Petitioners come to facing up to the legislative history of the Act is on pp. 30-31 of the Bergna Brief, which quotes from the Senate Judiciary Committee Report to the effect that fees may be collected either from (1) the official; (2) from his agency's funds; or (3) "from the State or local government (whether or not the agency or government is a named party)." That Congress may have sought to impose direct liability for fees upon the governmental entity (even though it is not a party to the suit) hardly evidences a desire to exempt the named defendant.

Petitioners' failure to come to grips with the legislative scheme is evidenced by their additional argument that the governmental entity is exempt from a fee award as well. See Bergna Brief, at 31-33. This question is before the Court in *Hutto v. Finney*, No. 76-1660, *supra*, note 33. As the fee award in this case was rendered only against the named, individual defendants, and not against any governmental entity, that question is not presented here. It is, however, worth noting that the sum of Petitioners' various arguments is that Congress labored mightily to produce a mouse: an Act which, despite its unequivocal language, authorizes a fee award enforceable against no one, unless there is an individual defendant who has only qualified immunity and who is shown to have acted in bad faith.

37. Congress was, of course, well aware that fees could, under *Alyeska*, be awarded in "bad faith" cases. See, e.g., S. Rep., at 5 n.7; H.R. Rep., at 2 n.1.

"[W]hile damages are theoretically available [in Civil Rights Act cases], it should be observed that, in some cases, immunity doctrines and special defenses, available only to public officials, preclude or severely limit the damage remedy. [Citing *Wood*, *Scheuer*, and *Pierson*]. Consequently, awarding counsel fees to prevailing plaintiffs in such litigation is particularly important and necessary if Federal civil and constitutional rights are to be adequately protected. To be sure, in a large number of cases brought under the provisions covered by H.R. 15460, only injunctive relief is sought, and prevailing plaintiffs should ordinarily recover their counsel fees." (H. Rep. at 9).

And on the floor of the Senate, Senator Abourezk stated that one of the Act's purposes was to eliminate the necessity, created by *Alyeska*, of adjudicating the good faith of the defendants:

"[The Act] will also result in a significant saving of judicial resources. At present, due to the *Alyeska* decision, a court must analyze a party's actions to determine bad faith in order to award attorneys' fees. This is a complex, time-consuming process often requiring an extensive evidentiary hearing. The enactment of this legislation will make such an evidentiary hearing unnecessary in the many civil rights cases presently pending in the Federal courts." (122 CONG.REC. S17052).

That Congress deliberately meant to authorize the award of fees in cases of this type could hardly be made plainer than by the Judiciary Committee's explicit and approving reference to decisions—including *this very case*—awarding fees without regard to the good or bad faith of the defendant:

"It is intended that the amount of fees awarded under S. 2278 be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases and not be reduced because the rights involved may be nonpecuniary in nature. The appropriate standards, see *Johnson v. Georgia Highway Express*, 488

F.2d 714 (5th Cir. 1974), are correctly applied in such cases as *Stanford Daily v. Zurcher*, 64 F.R.D. 680 (N.D. Cal. 1974); *Davis v. County of Los Angeles*, 8 E.P.D. ¶ 9444 (C.D. Cal. 1974); and *Swann v. Charlotte-Mecklenburg Board of Education*, 66 F.R.D. 483 (W.D.N.C. 1975). These cases have resulted in fees which are adequate to attract competent counsel, but which do not produce windfalls to attorneys. In computing the fee, counsel for prevailing parties should be paid, as is traditional with attorneys compensated by a fee-paying client, 'for all time reasonably expended on a matter.' *Davis*, *supra*; *Stanford Daily*, *supra*, at 684." (S. Rep., at 6).

3. As the foregoing quotation from the Senate Judiciary Committee Report indicates, Congress intended the Act to restore the pre-*Alyeska* rules and standards for awarding fees in Civil Rights Act cases which had evolved in the lower courts.³⁸ This prior law provides no support for the notion that immunity from damages extends to an award of attorney's fees.

It has long been the rule that public entities or employees may be taxed costs even though liability for damages may be barred.³⁹ Congress was aware of that rule (see S. Rep., at 5) and reflected its intent that the statutory immunity from damages

38. Thus the Senate Judiciary Committee Report added: "This bill creates no startling new remedy—it only meets the technical requirements that the Supreme Court has laid down if the Federal courts are to continue the practice of awarding attorneys' fees which had been going on for years prior to the court's [*Alyeska*] decision." *Id.*, at 6; see also H.R. Rep., at 6-9.

39. See, e.g., *Fairmont Creamery Co. v. State of Minnesota*, 275 U.S. 70 (1927); *Sims v. Amos*, 340 F.Supp. 691 (M.D. Ala.), *aff'd*, 409 U.S. 942 (1972) (per curiam); *Boston Chapter N.A.A.C.P., Inc. v. Beecher*, 504 F.2d 1017, 1028-29 (1st Cir. 1974), *cert. denied sub nom. Director of Civil Service v. Boston Chapter N.A.A.C.P., Inc.*, 421 U.S. 910 (1975); *Class v. Norton*, 505 F.2d 123, 126 (2d Cir. 1974); *Samuel v. University of Pittsburgh*, 538 F.2d 991, 999 (3d Cir. 1976); *Gates v. Collier*, 70 F.R.D. 341, 347-48 (N.D. Miss. 1976); *Welsch v. Likins*, 68 F.R.D. 589, 594-95 (D. Minn. 1975), *aff'd*, 525 F.2d 987 (8th Cir. 1975) (per curiam).

not bar a fee award by providing in the Act that fees be treated "as part of the costs."

Further, Congress was of course aware that, prior to *Alyeska*, those courts which had awarded attorneys' fees under the "private attorney general" rationale had done so without pausing to inquire whether the defendants had acted in "bad faith".⁴⁰ Moreover, the Act was patterned after previous fee award statutes which the Court on two occasions held to authorize fee awards without regard to the defendants' good or bad faith. *Bradley v. Richmond School Board*, *supra*; *Newman v. Piggie Park Enterprises*, 390 U.S. 400 (1968). In *Bradley*, the District Court had awarded attorney's fees on, *inter alia*, the ground of the school board's bad faith. See 53 F.R.D. 28, 39-40 (E.D. Va. 1971). The Court of Appeals reversed, finding that the board had not acted in bad faith or been "unreasonably obdurate." See 472 F.2d 318, 320-27 (4th Cir. 1972). This Court reversed the Court of Appeals, reinstating the District Court's fee award, on the basis of the recently enacted legislation authorizing fee awards in Title VI cases. In so doing, however, the Court did *not* discuss the "bad faith" issue, let alone disapprove the Court of Appeals' determination that the school board had not been in bad faith; it simply found that Congress had authorized fee awards, and that such

40. See, e.g., *Brandenberger v. Thompson*, 494 F.2d 885, 888 (9th Cir. 1974); *Souza v. Travisono*, 512 F.2d 1137, 1138-39 (1st Cir. 1975), *vacated and remanded for further consideration in light of Alyeska*, 423 U.S. 809 (1976). Indeed, of the thirteen decisions cited by this Court in *Alyeska* as exemplars of those cases in which the "private attorney general" rationale had been applied (see 421 U.S., at 270 n.46), in all but three the question of the defendant's bad faith was treated as irrelevant to the question of awarding fees, and in the other three cases (*Fairley v. Patterson*, 493 F.2d 598, 606 (5th Cir. 1974); *Lee v. Southern Home Sites Corp.*, 444 F.2d 143, 144 (5th Cir. 1971); *Cornist v. Richland Parish School Board*, 495 F.2d 189, 192 (5th Cir. 1974)), the bad faith of the defendants was viewed as a possible alternative basis for the fee award.

authority applied to pending cases.⁴¹ Similarly, in *Newman*, the Court of Appeals had allowed fees only to the extent that the defendants had proceeded in bad faith. The Court reversed, holding that the applicable fee statute was

"enacted . . . not simply to penalize litigants who deliberately advance arguments they know to be untenable but, more broadly, to encourage individuals . . . to seek judicial relief. . . ."

It follows that one who succeeds in obtaining an injunction . . . should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." (390 U.S., at 402).

Thus in both cases a finding of bad faith was found by this Court to be unnecessary for the award of attorneys' fees. Both *Bradley* and *Newman* were referred to throughout the legislative history of the Act, which is plainly modeled after the fee award provisions dealt with in those cases. See e.g., S. Rep., at 3, 4, 5; H.R. Rep., at 2, 4 n.6, 6, 8, 9.

4. Petitioners cite no decision of any court in support of their interpretation of the Act. We know of none. The new Act has been uniformly applied to authorize fees against defendants sued in their official capacity without regard to their good faith or bad faith. See, e.g., *Alicia Rosado v. Garcia, Santiago*, 562 F.2d 114 (1st Cir. 1977); *Brown v. Culpepper*, 559 F.2d 274 (5th Cir. 1977); *Finney v. Hutto*, *supra*, note 32; *Martinez Rodriguez v. Jimenez*, 551 F.2d 877 (1st Cir. 1977) (explicitly holding that claim of bad faith need not be considered in order to award fees); *Rainey v. Jackson State College*, 551 F.2d 672 (5th Cir. 1977); *Bond v. Stanton*, 555 F.2d 172 (7th Cir. 1977); *Wade v. Mississippi Co-op Extension Service*, 424 F.Supp. 1242 (N.D. Miss.

41. The defendants in *Bradley* had, of course, an immunity against money damages absent a finding of bad faith. See *Wood v. Strickland*, *supra*.

1976);⁴² *McCormick v. Attala City Board of Education*, 424 F.Supp. 1382 (N.D. Miss. 1976); *Gary W. v. State of Louisiana*, 429 F.Supp. 711 (E.D. La. 1977); *Wilson v. Chancellor*, 425 F.Supp. 1227 (D. Ore. 1977); *Georgia Association of Educators v. Nix*, F.Supp. No. C-74-1870 A, decided Jan. 26, 1977 (N.D. Ga.); *Commonwealth of Pennsylvania v. O'Neill*, 431 F.Supp. 700 (E.D. Pa. 1977); but cf. *Skehan v. Board of Trustees of Bloomsburg State*, 436 F.Supp. 657, 665-66 (M.D. Pa. 1977).

CONCLUSION

The judgment should be affirmed.

DATED: December 16, 1977.

Respectfully,

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42. In *Wade*, the District Court expressly found that certain individual defendants had not been in bad faith. It held that they could be liable for fees in their *official* capacities, but in light of their good faith could not be liable for fees in their *individual* capacities. As the District Court understood the effect of that distinction, the fees would be payable out of public funds but not out of the defendants' own resources. See also *Universal Amusement Co. v. Vance*, 559 F.2d 1286, 1300-01 (5th Cir. 1977). This distinction is not significant for purposes of the present case because the defendants were all sued in their official capacity and, under California law (see p. 58, *supra*), the fee award will be paid by public entities.

JAN 11 1978

IN THE
Supreme Court of the United States

RODAK, JR., CLERK

OCTOBER TERM, 1977

No. 76-1484JAMES ZURCHER, et al., *Petitioners*,

VS.

THE STANFORD DAILY, et al., *Respondents*.**No. 76-1600**LOUIS P. BERGNA, District Attorney, et al., *Petitioners*,

VS.

THE STANFORD DAILY, et al., *Respondents*.

On Writs of Certiorari to the United States Court of Appeals
 for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS BERGNA AND BROWN

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1484

JAMES ZURCHER, Individually and as Chief of Police of
the City of Palo Alto, County of Santa Clara, State
of California, JIMMIE BONANDER, PAUL DEISINGER,
DONALD MARTIN and RICHARD PEARDON, all
Individually and as Police Officers of the
City of Palo Alto, County of Santa
Clara, State of California,
Petitioners,

vs.

THE STANFORD DAILY, FELICITY A. BARRINGER, FRED MANN,
EDWARD H. KOHN, RICHARD LEE GREATHOUSE,
ROBERT LITTERMAN, HALL DAILY
and STEVEN G. UNGAR,
Respondents.

No. 76-1600

LOUIS P. BERGNA, District Attorney, Santa Clara
County, California, and CRAIG BROWN,
Deputy District Attorney,
Petitioners,

vs.

THE STANFORD DAILY, et al.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals
for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS BERGNA AND BROWN

ARGUMENT

I

RESPONDENTS' RETREAT FROM THE POSITION THEY SOUGHT AND OBTAINED IN THE LOWER COURTS IS NOT ENOUGH. THEY CONTINUE TO SEEK A NOVEL, ENCUMBERING RULE AND FAIL TO RECOGNIZE THAT THIS COURT'S RULES ADEQUATELY PROTECT FIRST AND FOURTH AMENDMENT INTERESTS.

In the lower courts respondents sought and obtained two new rules. The first ruling was that "law enforcement agencies cannot obtain a warrant to conduct a third party search unless the magistrate has probable cause to believe that a subpoena duces tecum is impractical." App. Pet. 26. The second was that in newspaper searches "a search warrant should be permitted only in the rare circumstances where there is a *clear showing* that (1) important materials will be destroyed or removed from the jurisdiction; *and* (2) a restraining order would be futile." App. Pet. 33. (Court's own emphasis.) Respondents now abandon the second rule.¹ In addition they propose to narrow the first rule, to apply to newspapers only² and even that rule would not apply to contraband, nor to the

¹This retreat seems a clear acknowledgement that the lower courts' rulings are too broad to be defended in this Court. Yet these federal rulings were delivered without any consideration of the protections in California's search law and in partial reliance on a rationale (the supposed absence of a vicarious exclusionary rule) that is not applicable in a consideration of California law. Such actions make a mockery of the principles of comity. See *Bergna* Brief at 24-26.

²Respondents do make a brief alternative argument for yet another rule that would apply to all third parties. Respondents' Brief at 40. But this proposed rule is markedly different from the rulings obtained in the lower courts. See n.13, *infra*.

"fruits" or "instrumentalities" of crime but only to "mere evidence". Respondents' Brief at 11.³

Respondents' retreat is not enough. Even the new newspaper rule now proposed by respondents is proved unworkable by the facts of this case. Respondents must recognize that the established protections of the First and Fourth Amendments properly used will adequately protect the interests at stake in the rare newspaper search.⁴

³Respondents seek to revive the mere evidence distinction condemned by both scholars and the courts and finally interred by this Court in *Warden v. Hayden* (1967) 387 U.S. 294. If we follow respondents' present suggestion, all the difficulties and absurdities of the old "mere evidence" rule would return to haunt the courts. See *Traynor*, C.J.'s opinion in *People v. Thayer* (1965) 63 Cal.2d 635, 47 Cal.Rptr. 780.

⁴Respondents are mistaken when they assert that third party searches have been uniformly condemned. See *In re Search Warrant Issued Against Premises Of Simon, Etc.* (N.J. 1935) 177 A. 557; *People ex rel. Carey v. Covelli* (1975) 61 Ill.2d 394, 336 N.E.2d 759. See also *United States v. Jeffers* (1951) 342 U.S. 48, the clear implication of which is that a third party search pursuant to warrant is perfectly proper.

Three of the four cases that respondents cite on this point (Respondents' Brief at 43 n.23) were also cited by the Ninth Circuit and have already been shown inapposite in the briefs. *Bergna* Brief at 14 n.12; *Zurcher* Brief at 31 n.17. In the fourth case, *People v. Carver* (1939) 16 N.Y.S.2d 268, a district attorney had sought a "novel" order for seizure of corporation books then in the possession of another governmental agency. The King's County Court said that seizures must be by subpoena duces tecum, search warrant or incident to arrest, and implied in dictum that the state search warrant statute then in effect would not authorize seizure of the documentary evidence in question. Furthermore, the court even implied agreement with the district attorney's statement that the rights of third parties "are not as sacred as those of a defendant." 16 N.Y.S.2d at 271.

For another explicit rejection of the Ninth Circuit's rule see *State v. Tunnel Cuto Services* (1977) 149 N.J. Super. 427, 374 A.2d 32, 35.

A. Established Protections Ensure That Newspaper Searches Do Not Constitute A Threat To The Interests At Issue.

Respondents and media *amici* claim that the number of newspaper searches has reached a disturbing level. Respondents' Brief at 32, n.17; Media Brief at 11-13.⁵ In fact, the number of press searches is small. Media *amici*'s own statistics indicate a total of six press searches since 1971, i.e., an average of one search per year. Media Brief at 11. In *Branzburg v. Hayes* (1972) 408 U.S. 665, this Court rejected a constitutional newsman's privilege despite the assertion that "press subpoenas have multiplied." 408 U.S. at 699. Search warrants are, of course, much less common than subpoenas. This is in part because the law allows subpoenas to issue without a showing of probable cause to believe that premises contain evidence of a crime.⁶ It is also because, as our district attorney *amici* point out, elected and appointed prosecutors will always hesitate to search any news organization for fear of "career-crushing" political and public backlash. Dist. Atty. Brief at 25. "[T]here is much force in the pragmatic view that the press has at its disposal powerful mechanisms of communication and

⁵This is a reference to the brief *amici curiae* filed in support of respondents and on behalf of The Reporters Committee For Freedom of The Press and other media organizations. The brief *amici curiae* filed in support of respondents and on behalf of the National Association of Criminal Defense Lawyers, Inc. is referred to hereinafter as Def. Attys. Brief. The brief *amici curiae* filed in support of petitioners and on behalf of The National District Attorneys Association and The California District Attorneys Association is referred to as Dist. Atty. Brief.

⁶*In re Blue Hen Country Network, Inc.* (Del. 1973) 314 A.2d 197, 201. See *Oklahoma Press Publishing Co. v. Walling* (1946) 327 U.S. 186.

is far from helpless to protect itself from harassment or substantial harm". *Branzburg* at 706.

Respondents claim that the threat of searches will deprive the press of numerous news sources, relying for their claim on the affidavits of several prominent journalists. Respondents' Brief at 19-22. It is unlikely that anyone will dispute the respectability of these journalists. It is also unlikely that any impartial person will fail to recognize the strong bias that these journalists have on the points to which they speak. Their allegations that news sources will be lost "are chiefly opinions of predicted informant behavior and must be viewed in the light of [their] professional self-interest" *Branzburg* at 694. It is clear that the journalists' opinions presented here are similarly too alarmist. Newspaper searches do not occur very often, and when they do, the rules established by this Court minimize their intrusiveness. Surely, not very many of the nation's news sources could have been frightened into silence by the fifteen minute search that occurred in our case.⁷ The Stanford Daily certainly was not.

Media *amici* claim that the seizure of news documents or photographic materials may be so "large

⁷Media *amici* are wrong when they say there was "no opportunity for staff to locate and produce the requested photograph itself." Media Brief at 30. The police did ask for cooperation in producing the sought after photographs. They did not get it. A130-131.

We note that, aside from their concern that sources will be frightened away, respondents and their media *amici* also cite concerns of possible physical disruption, exposure of the editorial process, the jeopardizing of newspaper credibility, and the creation of self-censorship. These concerns are overstated for the same

scale" as to constitute a "wholesale obstruction to the circulation of information and ideas" Media Brief at 29.⁸ There are at least two answers to this claim. First, the claim assumes, improperly we think, that an issuing magistrate will exceed his authority under *Heller v. New York* (1973) 413 U.S. 483.⁹ Second, we do not have such facts in this case. We have a warrant that is narrow in scope.

Respondents argue that newspaper searches thwart state shield laws. Respondents' Brief at 28-30. This argument is of doubtful validity. Warrants issue only when there is probable cause to believe that the materials sought constitute evidence of a crime. Even the executive privilege of the President of the United States falls short of an absolute protection for this type of evidence.¹⁰ In California, it is most doubtful that the statutory newsman's privilege would be interpreted as providing such a protection. See *Rosato v. Superior Court* (1975) 51 Cal.App.3d 190, 218, 124 Cal.Rptr. 427, 446, cert. den. 427 U.S. 912 stating that the shield law is inapplicable to a newsman witnessing

reasons as is the concern of diminution of sources. Just as the rule of scrupulous exactitude and the practical limits on press searches protect against unnecessary breaches of confidence, so do these factors also minimize physical disruption, exposure of the editorial process, the jeopardizing of credibility, and the creation of self-censorship.

⁸This claim is part of the argument that judicial appraisal of First Amendment interests is inadequate because no adversary hearing is held before the warrant issues. That argument is answered by the cases cited in our discussion of the rule of scrupulous exactitude. See *Stanford v. Texas* (1965) 379 U.S. 476 and other cases cited in Bergna Brief at 20-22.

⁹See also *A Quantity of Books v. Kansas* (1964) 378 U.S. 205; *Marcus v. Search Warrant* (1961) 367 U.S. 717.

¹⁰*United States v. Nixon* (1974) 418 U.S. 683, 703-707.

a crime.¹¹ At any rate, the shield law argument is out of place here. If, in fact, the intent of a state's legislature were being frustrated by newspaper searches, we could assume that either that state's courts or that state's legislature would respond in a proper manner. Certainly the fact that newspaper searches raise an issue as to the interpretation of state shield laws is no justification for making every newspaper into a virtual constitutional sanctuary beyond state legislative control. Compare *Branzburg* at 697.

Respondents also claim that use of a warrant against a newspaper violates the principle that infringement of protected First Amendment rights must be no broader than necessary to achieve a "compelling" or "paramount" public interest. Respondents' Brief at 38-40.¹² A warrant issues only to achieve a compelling public interest, i.e., only when there is probable cause to believe that the materials sought constitute evidence, contraband, fruits, or instrumentalities of a crime. The rule of scrupulous exactitude applicable to warrants touching on First Amendment interests assures that the search is no broader than is necessary to serve the compelling interest, i.e., this rule assures that there can be no "prob[ing] at will and without relation to existing

¹¹Respondents' sole authority for the proposition "the materials are now plainly protected by Section 1070 of the California Evidence Code" (Respondents' Brief at 49, n.26) is a law review note (28 Stan.L.Rev. 957, 989 (1976)) which fails to discuss the *Rosato* case.

¹²See e.g. *Freedman v. Maryland* (1965) 380 U.S. 51; *Near v. Minnesota* (1931) 283 U.S. 697, 722; *Branzburg* at 680-681, 699.

need." *DeGregory v. Attorney General of New Hampshire* (1966) 383 U.S. 825, 829. In short, the warrant is the best "least drastic means." Finally, as we show in our next argument, the facts of our own case demonstrate that the subpoena, offered by respondents as an even less drastic means, just does not accomplish the same ends as the warrant.

B. The Record Of This Case Demonstrates The Unworkable Nature Of The Novel Constitutional Principle Proposed By Respondents.

We think most newspapers are responsible. But respondents' position necessarily assumes that *all* newspapers must be presumed to have that special sort of responsibility that will provide an adequate resistance to the pressures to dispose of criminal evidence. (See Bergna Brief at 17-19). Thus respondents are upset that a portion of our statement of facts goes fairly strongly against their assumption. They accuse us of "an unsubtle attempt to cast doubt upon the integrity of the Daily and its staff." Respondents' Brief at 6, n.1. We do not mean to be subtle on this point. We mean to be explicit. That is why we again quote what the *Daily* in an editorial published *before* the search said it would do with criminal evidence:

"Negatives which may be used to convict protesters will be destroyed The Daily feels no obligation to help in the prosecution of students for crimes related to political activity." A.118.

And we quote what the Daily in an editorial published *after* the search said of its attitude toward criminal evidence:

"It has been the Daily's standing policy to destroy all potentially incriminating unpublished photographic material." A.119-120.

The plain meaning of the above policy statements, whether read separately or as a part of the editorials in which they appear, is that criminal evidence of the kind described will be routinely destroyed regardless of whether it is the object of a subpoena. Respondents both espoused and published this policy so as to obtain the trust of radical groups and thus obtain an inside track on the other media in the reporting and photographing of violent confrontations. A.133. They cannot be heard to complain of having been hoist by their own petard. Respondents totally reject the ancient and honorable duty of those protected by our laws to assist in upholding them at least to the extent of telling the truth about what they saw and heard, and modernly, photographed and recorded. We say this rejection is totally irresponsible.

Respondents' other complaint about our use of the above facts is that they are irrelevant. The relevance is this: These facts show that the news profession like the legal profession, the medical profession or any other profession has its irresponsible members. These facts show that the subpoena alternative could not have worked with the very members of the profession who now propose it; it would have not worked because these persons would have destroyed the criminal evidence.

Despite their convincing nature, these facts are characterized by respondents as insufficient to meet

their test of subpoena impracticality. Respondents' Brief at 5, n.1, 37, n.21. Amazingly, in dictum, the Federal District Court agreed. 353 Supp. at 135, n.16. If this is true it is difficult to envision any set of facts that might meet the old test. Even if we assume that these facts would justify the issuance of a warrant under the rule respondents presently propose, the new rule will not work in the usual case.¹³ The Daily's publication of its evidence destruction policy is most unusual. In the usual case, fringe newspapers will not proclaim their intention to destroy evidence. Clear evidence of subpoena impracticality will not be available. A fringe newspaper—even perhaps a “sham” newspaper (*Branzburg* at 705 n.40)—then becomes a constitutional sanctuary; neutral and detached magistrates may not authorize the search of that newspaper even though they are shown evidence that clearly satisfies them of the existence of probable cause to believe the newspaper has convincing evidence not only of a felony, but also of the identity of the fugitive felons.

¹³The alternative rule which respondents advance for “non-suspects” generally suffers from the same unworkable nature as the rule advanced for non-suspect newspapers. This alternative rule would prevent the issuance of the “third-party” warrant despite the existence of traditional probable cause, where the warrant application affirmatively shows (1) absence of special relationship to the suspect, (2) special “status” of the third party, (3) grounds to resist compelled production, (4) particularly sensitive privacy interests, and (5) that a subpoena is not otherwise impractical. We are unsure of the meaning of several of these criteria but we have a clear complaint against the second. For the reasons we state a presumption of responsibility from status is unjustified.

We ask this Court to reject respondents' proposals.”

II

THE LEGISLATIVE HISTORY OF THE ACT DOES NOT SUPPORT RESPONDENTS' ARGUMENT THAT JUDGES AND PROSECUTORS ARE NOT IMMUNE FROM THE IMPOSITION OF ATTORNEYS' FEES.

The central thrust of respondents' brief is that the Attorneys' Fees act abrogates the common law immunities to fee awards and does not require a showing of “bad faith” as a condition of awarding fees. The foundation of this argument is that petitioners have ignored the legislative history and purpose of the Act.¹⁴

¹⁴We note that defense attorneys *amici* also propose a new rule for nonsuspects generally. This rule would require that the warrant application contain “sufficient facts for the magistrate to determine that the person for whom the authority to search is sought bears a relationship with a criminal suspect (not necessarily identified) which would suggest a manifest probability that the evidence will be destroyed, secreted or removed from the jurisdiction.” Def. Attys. Brief at 10-11. Although amici say they do not mean their rule to incorporate the new probable cause requirements that the Ninth Circuit would add, there appears to be little practical difference between the *amici* proposal and the Ninth Circuit ruling. The proposal should be rejected for the reasons stated in our brief. *Bergna* Brief at 16-20.

Respondents also contend that Congress intended that the Act apply retroactively and that petitioners “do not contend that application of the Act to pending cases is in some way unconstitutional.” Respondents' Brief, 56. In fact, petitioners did assert that retroactive application of the Act would result in a denial of due process. *Bergna* Brief, at 27 n.20. In any event, the Act does not mandate the award of fees, but calls for an exercise of discretion. Such discretion includes the duty to determine if any special circumstances exist, which would render the award of attorneys' fees unjust. *Wharton v. Knefel* (8th Cir. 1977) 562 F.2d 550, 558; *Beazer v. New York City Transit Authority* (2nd Cir. 1977) 558 F.2d 97, 101.

We submit that respondents, not petitioners, have not only ignored the legislative history of the Act, but have also failed to come to grips with our primary contention. As stated in the Bergna Brief at 30, the Senate Report clearly suggests that an individual official will not be held personally responsible for the payment of attorneys' fees. A recent case from the Fifth Circuit concluded, *inter alia*, that "... the Attorney's Fees Award Act does not change judicially established rules governing immunity for unconstitutional acts committed by a person acting in official capacity." *Universal Amusement Co., Inc. v. Vance* (5th Cir. 1977) 559 F.2d 1286, 1301. There is therefore no doubt that a prosecutor who secures a search warrant is acting in his official capacity and is consequently immune from the imposition of attorneys' fees.

Respondents also fail to meet our argument that the Act does not explicitly overrule this Court's decisions that state and local government entities are not "persons" within the meaning of section 1983, and hence are not subject to the imposition of attorneys' fees. Bergna Brief, at 31-32. Understandably, respondents totally ignore the new proposed legislation, which by explicitly providing that governmental entities be parties, recognizes that the Act does not cover those parties. In an analogous context, it has been held that in the absence of explicit language subjecting the states to liability for damages and attorneys' fees, a state's immunity under the Eleventh Amendment would not be limited. *Skehan v. Board of*

Trustees of Bloomsburg State (M.D. Pa. 1977) 436 F.Supp. 657, 667.¹⁶

Finally, we do not agree that *Fitzpatrick v. Bitzer* (1976) 427 U.S. 445 refutes our contention that any Congressional attempt to abrogate the absolute immunity afforded judges, prosecutors and those who carry out judicial orders would exceed the permissible scope of the Fourteenth Amendment to the United States Constitution. This Court is not required to uphold any legislation simply because some members of Congress cite section 5 of the Fourteenth Amendment. In an area as sensitive as a state's criminal justice system, we submit that any attempt by Congress to interfere with the immunities of judges and prosecutors necessary to carry out their duties exceeds the scope of the Fourteenth Amendment. Imposition of attorneys' fees in section 1983 suits constitutes a significant and undue interference with the rights and duties of judges and prosecutors and should not be sanctioned by this Court.

¹⁶As stated in the Bergna Brief, at 32-33, the fact that California has an indemnity statute does not confer jurisdiction in a case in which Congress has failed to do so.

CONCLUSION

We ask this Court to reverse the judgment of the Ninth Circuit.

Dated: January 10, 1977

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1484

JAMES ZURCHER, et al., *Petitioners,*

vs.

THE STANFORD DAILY, et al., *Respondents.*

No. 76-1600

LOUIS P. BERGNA, District Attorney, et al., *Petitioners,*

vs.

THE STANFORD DAILY, et al., *Respondents.*

On Writs of Certiorari to the United States Court of Appeals
for the Ninth Circuit

**REPLY BRIEF FOR PETITIONERS ZURCHER, BONANDER,
DEISINGER, MARTIN AND PEARDON**

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1484

JAMES ZURCHER, Individually and as Chief of Police of
the City of Palo Alto, County of Santa Clara, State
of California, JIMMIE BONANDER, PAUL DEISINGER,
DONALD MARTIN and RICHARD PEARDON, all
Individually and as Police Officers of the
City of Palo Alto, County of Santa
Clara, State of California,
Petitioners,

vs.

THE STANFORD DAILY, FELICITY A. BARRINGER, FRED MANN,
EDWARD H. KOHN, RICHARD LEE GREATHOUSE,
ROBERT LITTERMAN, HALL DAILY
and STEVEN G. UNGAR,
Respondents.

No. 76-1600

LOUIS P. BERGNA, District Attorney, Santa Clara
County, California, and CRAIG BROWN,
Deputy District Attorney,
Petitioners,

vs.

THE STANFORD DAILY, et al.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals
for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS ZURCHER, BONANDER,
DEISINGER, MARTIN AND PEARDON

ARGUMENT

I.

RESPONDENTS RELY UPON UNPROVEN FACTS

Respondents place extraordinary reliance upon facts that (1) are not a matter of record, (2) were controverted below, and therefore must be resolved in Petitioners' favor (6 MOORE'S FEDERAL PRACTICE ¶ 56-27 [1] (2nd ed. 1974)), or (3) are unsupported assumptions.

Respondents assert that no one connected with the *Stanford Daily* was involved in the felonies under investigation or in the hospital demonstration in general. (RB 2, 12.) This is not a matter of record. Petitioners did not know who the suspects were; this was the very reason a warrant for photographs of the assaults was necessary. Petitioners further were denied any reasonable opportunity for discovery before summary judgment was granted¹ to ascertain whether or not student members of the *Stanford Daily* had links to the hospital demonstration. (See Petitioners' Brief 6, n.2.)

Respondents rely heavily on the alleged presence of confidential or personal materials in the premises of the *Stanford Daily*. (RB 2-3, 21, n.9, 31-32.) Respondents' allegations were never put to the test via discovery or cross-examination at a trial, however.

Of particular import to Respondents' argument is the unsupported assertion that the magistrate was not

¹The responding party in a summary judgment context must be given a prior opportunity for discovery in order to establish the existence of a material fact issue. FED. RULES CIV. PROC., rules 56(e), 56(f); KAPLAN, *Amendments of the Federal Rules of Civil Procedure, 1961-1963 (II)*, 77 HARV. L. REV. 801, 826, 827 (1964).

aware of the impracticality of using a subpoena in this case. (RB 5, 34, 36-37.) The formal record, however, is silent on the point. Reference was made to Judge Phelps' foreknowledge during oral argument on Respondents' summary judgment motion on July 10, 1972. When the district court questioned whether a magistrate could take judicial notice of the policy of a newspaper (RT 135), Mr. Stephenson, attorney for the defendant magistrate, responded:

"I believe we would be prepared to show that Judge Phelps was in fact informed of that policy. We have not done so in this case. Judge Phelps is not here and indicates he needs his own counsel to be present in this case." (RT 135:11-15.)

When the district court had further questions on the issue, Mr. Stephenson again informed the court:

"Well, Your Honor, as I indicated, I believe that we would be able to demonstrate, although I have not discussed this with Judge Phelps and myself, that we would be able to indicate that he was apprised of the fact of the [*Stanford Daily*] policy [to destroy incriminating photographs], although Your Honor may not be convinced that that shows adequately on the face of the affidavit." (RT 136:22-25, 137:1-2.)

Subsequently Mr. Stephenson stated again:

"I am advised that there was an extensive discussion with Judge Phelps prior to the issuance of that warrant. But whether or not—you have earlier indicated you believe that would have to be shown on the face of the affidavit." (RT 157:1-5.)

II.

THE SEARCH WARRANT WAS PROPER UNDER
A FIRST AMENDMENT ANALYSIS

In *Branzburg v. Hayes*, 408 U.S. 665 (1972) the Supreme Court held that requiring journalists to appear and testify before state or federal grand juries does not abridge freedom of speech and press guaranteed by the First Amendment. Further, a journalist does not have any qualified constitutional testimonial privilege.

There is no significant difference between the constitutional claims made in *Branzburg* and those urged by Respondents² in this case. (RB 15-16, 18-24.)³ In *Branzburg* the journalists claimed that the forced rev-

²Respondents unsuccessfully urged their First Amendment theories at both the district court and circuit court levels. The district court specifically requested Respondents to concentrate on the broader Fourth Amendment, third-party argument (RT 114-115) and based its decision exclusively on this ground (Petition, App. C). The Ninth Circuit adopted the district court's rationale. (Petition, App. A.)

³Respondents allege cost and disruption factors in a search situation. (RB 18.) However, the costs to a newspaper in complying with a subpoena duces tecum can be far greater. There is the expense in having to comb through its files and produce relevant evidence; an even greater cost is entailed when a reporter has to be taken off a beat and cannot file stories because of court appearances. V. BLASI, *PRESS SUBPOENAS: AN EMPIRICAL AND LEGAL ANALYSIS, STUDY REPORT OF THE REPORTERS' COMMITTEE ON FREEDOM OF THE PRESS* 257 [hereinafter "Blasi"].

Respondents claim that the use of search warrants in a media context is a recent phenomenon. (RB 32, n 17). Yet the situation with respect to search warrants is little different than that concerning media subpoenas. In *Branzburg* the phenomenon of press subpoenas also was argued to be of recent origin and fast growing. (408 U.S. at 699.) Confrontations between law enforcement agencies and the press traditionally had occurred on a local level, where the press usually was able to work things out without going to court, so there was precious little law on the subject. *PRESS FREEDOMS UNDER PRESSURE, REPORT OF THE TWENTIETH CENTURY*

elation of confidences would deter sources from giving publishable information to the press, to the detriment of the free flow of information. They used the same "chilling effect" argument Respondents rely upon that it would result in self-censorship by both the

FUND TASK FORCE ON THE GOVERNMENT AND THE PRESS 62 (1972) [hereinafter "Twentieth Century Fund"].

Few subpoenas were issued until 1969, when the Justice Department investigated members of several radical groups, such as the Black Panther Party and the Weatherman faction of Students for a Democratic Society, in connection with such matters as disturbances in Chicago in 1968, a campus bombing in Wisconsin, threatening the President of the United States, and advocating the violent overthrow of the government. *Twentieth Century Fund* at 62-63.

The need to utilize search warrants in connection with criminal investigations, particularly of radical groups and underground newspapers, arose about the same time. Reportedly the Dallas police searched an underground newspaper in 1968 and found quantities of allegedly obscene materials. *Twentieth Century Fund* at 35. A 1969 search of the San Diego *Street Journal's* office is also reported but with little detail. *Id.* at 35, 104.

In 1973 and 1974, after the search herein, warrants reportedly were served on *The Los Angeles Star*, a sexually explicit tabloid, and *The Berkeley Barb*, an underground newspaper in California, in connection with criminal libel charges and documentary evidence in the Patricia Hearst kidnapping case, respectively. *PRESS CENSORSHIP NEWSLETTER* No. VI at 30-31. In addition, searches of three California radio stations with strong links to radical groups, such as the New World Liberation Front, and with public policies similar to the *Stanford Daily* occurred about the same time. *Id.*

The reputation of underground newspapers and the like for cooperating with criminal investigations was decidedly poor in the late 1960's and early 1970's, particularly in California. Various papers were charged with advocating the violent overthrow of the government, criminal anarchy, and inciting to riot. *Twentieth Century Fund* at 103. Many metropolitan cities felt compelled to deny press credentials and police passes to reporters of underground newspapers. *Id.* at 103-104. A "Third World" San Francisco radio station refused to relinquish a letter from the New World Liberation Front in 1974 announcing the bombing of a San Francisco hotel; a search warrant had to be obtained before it was handed over. *PRESS CENSORSHIP NEWSLETTER* No. VI at 30. Similar refusals to aid police investigating a Los Angeles hotel bombing and the bombing of a former ITT executive's home by a radical group were given by a Los Angeles radio station and

press and potential sources, thus impairing both the right of the press to publish news and the right of the public to receive information.

The journalists in *Branzburg* urged the Supreme Court to find a qualified testimonial privilege, asserting that the burden on newsgathering outweighed any public interest in obtaining the data unless the government could show that a reporter possesses relevant information unavailable from other sources and for which the government has a compelling need. (408 U.S. at 679-681.) Respondents in this case make the same claim, arguing that the government must make a prior showing to the magistrate not only of the relevance of the items sought but also their unavailability through another process and the compelling need or urgency to resort to a search warrant. (RB 31-40.)

The issue in *Branzburg* (408 U.S. at 682) and the issue in this case are almost identical: The constitutional permissibility of utilizing an investigatory procedure of general applicability to obtain evidence relevant to the investigation and prosecution of crime.⁴

The Los Angeles Free Press, PRESS CENSORSHIP NEWSLETTER NO. VII at 11-12. Likewise, *The Berkeley Barb* told the FBI that a radical communique claiming responsibility for a bombing at the General Motors office in San Francisco was "no longer in existence." When a grand jury subpoenaed the document, the reporter to whom it had been delivered pleaded the First and Fifth Amendments. *Id.* at 12.

It was against this background of student unrest, radical groups in our cities and on our campuses, and a spirit of noncooperation being flaunted by parts of the media that the search warrant herein was sought and issued for potentially incriminating photographs on the premises of a college newspaper.

⁴The First Amendment issues are as limited here as in *Branzburg*. (See 408 U.S. at 681-682.) There is no intrusion upon speech or assembly, and no prior restraints or restriction on what the

Respondents seek to insulate themselves from the obligations of the rest of our citizens. In *Branzburg* this Court did not permit the press to absolve themselves of such obligations as citizens and did not find in the freedom of the press clause of the First Amendment such protection. In response to the claims made in *Branzburg* that the asserted burden on newsgathering required a privileged position for journalists, this Court responded:

"It is clear that the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability. Under prior cases, otherwise valid laws serving substantial public interests may be enforced against the press as against others, despite the possible burden that may be imposed. The Court has emphasized that '[t]he publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others.' *Associated Press v. NLRB*, 301 U.S. 103, 132-133, 57 S.Ct. 650, 656, 81 L.Ed. 953 (1937). . . ." (408 U.S. at 682-683.)⁵

press may publish. There is no express or implied command that the press publish what it prefers to withhold, and no exaction or tax for the privilege of publishing. No penalty, civil or criminal, related to the content of published material is sought to be imposed, and the use of confidential sources is neither forbidden nor restricted. There is no requirement that the press publish its sources of information or indiscriminately disclose them upon request.

⁵The Supreme Court pointed out that newsgathering and disseminating organizations were not exempt from the requirements of the National Labor Relations Act, and the claim that applying the Fair Labor Standards Act to a newspaper publishing business would abridge the freedom of the press has been rejected. (408 U.S. at 683.) Similarly, assertions that the First Amendment precluded application of the Sherman Act to a newsgathering and

In upholding the interest of the grand jury in obtaining testimony as against the claimed infringements on freedom of the press, the Supreme Court placed heavy reliance on the fact that society needs

disseminating organization has been overruled, and it has been held that a newspaper may be subjected to nondiscriminatory forms of general taxation. (*Id.*)

"The prevailing view is that the press is not free to publish with impunity everything and anything it desires to publish. Although it may defer or regulate what is said or published, the press may not circulate knowing or reckless falsehoods damaging to private reputation without subjecting itself to liability for damages, including punitive damages, or even criminal prosecution. [Citations omitted.] A newspaper or journalist may also be punished for contempt of court, in appropriate circumstances. [Citation omitted.]

"It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally. [Citations omitted.] . . .

"Despite the fact that news gathering may be hampered, the press is regularly excluded from grand jury proceedings, our own conferences, the meetings of other official bodies gathered in executive session, and the meetings of private organizations. Newsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded, and they may be prohibited from attending or publishing information about trials if such restrictions are necessary to assure a defendant a fair trial before an impartial tribunal. [Citations omitted.] . . ." (408 U.S. at 683-685.)

Since the *Branzburg* case in 1972, this Court has affirmed the general rule. For example, this Court held in *Time, Inc. v. Firestone*, 424 U.S. 448 (1976) and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) that the Constitution does not protect the media from severe civil liability in reporting on matters of public or general interest when neither public officials nor public figures are involved. In *Pell v. Procunier*, 417 U.S. 817 (1974) and *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974), the Supreme Court rejected the claim of journalists to more First Amendment rights concerning newsworthy events than persons claiming under the freedom of speech clause of the First Amendment.

In *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973), this Court also held that the freedom of a newspaper to control the content of its publications was subordinate to a local law banning sex-designated columns in help-wanted ads. The newspaper had argued that the law abridged its

and has the right to apprehend and punish persons engaged in illegal acts. It emphasized that the grand jury has a dual function in this regard to both determine if there is probable cause to believe a crime has been committed and to protect citizens against unfounded criminal prosecutions. (408 U.S. at 686-687.) A search warrant serves a similar dual function. In modern use, a warrant is an instrument for the investigation of crime and the apprehension of criminals, a basic tool to determine if in fact there is cause to believe a crime has been committed and who has committed it.⁶ In addition, a search warrant protects citizens against unfounded criminal prosecutions or unjust guilty verdicts in much the same manner as

editorial judgment regarding acceptance and placement of the advertisement in violation of the First Amendment.

One of the most recent cases directly involving the press and the question of restricting news flow is *Zacchini v. Scripps-Howard Broadcasting Co.*, _____ U.S. _____, 97 S.Ct. 2849 (1977). Zacchini, who performed a "human cannonball" act, claimed that a TV station had appropriated his name and act by taping and broadcasting the performance without his permission. The Court agreed that the TV station must pay Zacchini for his commercial stake in the performance, rejecting the First Amendment claim of undue infringement upon the ability of photographers to document the news.

In the freedom of speech area, of particular interest is *Heller v. New York*, 413 U.S. 483 (1973) involving a search warrant for a seizure of an allegedly obscene film. The Supreme Court sustained the seizure, indicating approval by dictum of a requirement of reasonable opportunity for continued showing pending final determination of obscenity but not exempting First Amendment items from seizure *per se*. In the 1976 term, the Supreme Court also upheld special zoning of adult bookstores, thus implicitly approving the zoning of speech-related establishments, in *Young v. American Mini-Theatres, Inc.*, 427 U.S. 50 (1976).

⁶See THE AMERICAN LAW INSTITUTE, A MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE 491, 509 (1975) [hereinafter "ALI"]; see also note 10, *infra*.

the grand jury by uncovering exculpatory as well as incriminating evidence.⁷

The Supreme Court in *Branzburg* also placed emphasis on the constitutional basis and long history of the grand jury. (408 U.S. at 686-688.) Similar historical and constitutional importance is placed on the search warrant. The modern search warrant stems from the old common-law warrant for stealing goods, a quasi-civil procedure for the benefit of victims of larceny or other conversion. THE AMERICAN LAW INSTITUTE, A MODEL CODE OF PRE-ARREST PROCEEDINGS 508 (1975). Constitutional recognition of the search warrant as a legitimate tool in criminal investigation is found in the Fourth Amendment, which specifies the conditions under which it may be issued and authorizes its use.⁸

⁷This is especially true of photographic evidence possessed by a newspaper. Frequently a news organization will have the best photographic or film record of mass happenings. This evidence can be crucial to a criminal defendant since nuances in the evidence regarding crimes such as obstructing public passages, breaches of peace, resisting arrest, aggravated assault, and refusal to disperse on order may spell the difference between conviction and acquittal (and probably the difference between prosecution or not). *Blasi*, *supra* note 3, at 253-254.

⁸During the twentieth century judicial opinion has strongly swung to the view that warranted searches ought to be preferred and encouraged. See for example, *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967). The judicial trend has been to expand the use of search and seizure by warrant, not to restrict its use as Respondents herein urge. Early cases had limited seizable property to fruits and instrumentalities related to the events upon which the intrusion was based. *Carroll v. United States*, 267 U.S. 132, 158 (1925); *Weeks v. United States*, 232 U.S. 383, 392 (1914). In 1925 the Supreme Court added instrumentalities of escape to the list in *Agnello v. United States*, 269 U.S. 20, 30 (1925). By 1947 the Supreme Court had expanded the scope of warrants further by allowing contraband unrelated to the charge under which an arrest was made to be seized incident to the arrest in *Harris*

The Supreme Court pointed out in *Branzburg* that the federal government and the majority of states had not provided journalists statutorily with the testimonial privilege claimed. (408 U.S. at 689.) Similarly, neither the federal government nor any state has exempted news media from general search and seizure law, either absolutely or on a conditional basis. Note, *Search and Seizure of the Media: A Statutory, Fourth Amendment and First Amendment Analysis*, 28 STAN. L. REV. 957, 962 (1976).

In face of the lack of news media shield laws in a majority of the states, the Supreme Court was asked in *Branzburg* to create a testimonial privilege by interpreting the First Amendment to grant journalists a testimonial privilege that other citizens do not enjoy. This Court responded:

"This we decline to do. Fair and effective law enforcement aimed at providing security for the person and property of the individual is a fundamental function of government, and the grand jury plays an important, constitutionally mandated role in this process. On the records now before us, we perceive no basis for holding that

v. United States, 331 U.S. 145, 155 (1947). The view was extended to cover fruits and instrumentalities unrelated to the suspected criminal conduct supporting the search in *Abel v. United States*, 362 U.S. 217, 238 (1960).

The *Harris* doctrine was further expanded to allow seizure of "mere evidence" both related and unrelated to the events in question in *Warden v. Hayden*, 387 U.S. 294, 307 (1967), and *Coolidge v. New Hampshire*, 403 U.S. 443, 466 (1971). The *Warden v. Hayden* decision signaled the expansion of seizable items to both corporeal and incorporeal information either by inspection or surveillance. *ALI*, *supra* note 6, at 497. The search warrant is such a basic and important tool for effective law enforcement that every jurisdiction in the United States has enacted statutes authorizing the issuance and use of search warrants. *Id.* at 494.

the public interest in law enforcement and in ensuring effective grand jury proceedings is insufficient to override the consequential, but uncertain, burden on news gathering that is said to result from insisting that reporters, like other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial." (408 U.S. at 690-691.)

Similarly in this case, the Court is asked to create a media exception to general search warrant procedures which state and federal governments have declined to do.⁹ The search warrant plays as an important and constitutionally recognized role in the fundamental function of government of providing security for the person and property of an individual as a grand jury subpoena.¹⁰ As in *Branzburg*, the record

⁹Respondents contend that the search warrant in question herein now would not be permitted under California's shield law which grants a limited testimonial privilege to newsmen. (RB 28, n. 12.) Respondents base their broad assertion on speculations in a student note in the *Stanford Law Review*.

The note writer admitted that the argument was theory only; application of California's shield law would require judicial extension of statutory language not mentioning search situations, directly or indirectly. Note, *Search and Seizure of the Media: A Statutory, Fourth Amendment and First Amendment Analysis*, 28 STAN. L. REV. 957, 967, 971 (1976). To date, no California court has chosen to read such an unexpressed intent into the statute.

In general, shield laws would not cover the kind of search warrant executed herein. Many require an explicit understanding of confidentiality between reporter and source (28 STAN. L. REV. 957, 968), an element missing in general photograph situations (*Twentieth Century Fund*, *supra* note 3, at 20, 50). Clearly absent in this case involving photographing of crimes committed in a public place is either an explicit or implicit understanding of confidentiality.

¹⁰Even a hostile commentator has acknowledged the importance of the governmental interest in this case: "The primary societal interest underlying law enforcement is 'security for the person

before this Court shows no basis for holding that the public interest in law enforcement and in ensuring an effective method of obtaining critical evidence, fruits, or instrumentalities of crime is insufficient to override the uncertain burden on newsgathering which Respondents allege."¹¹

and property of the individual' from 'reprehensible conduct forbidden to all other persons.' In the attempts by police to provide that security, a search is one of the most effective tools. It often provides a swift means of obtaining such persuasive evidence of criminal activity as narcotics, contraband, or weapons. By quarantining illicit items, the search may prevent future crimes as well as help to convict the guilty. Thus far, police executing warrants against news media have sought anonymous communiques claiming credit for crimes or photographs of alleged criminal acts. To the extent the police are denied the use of this technique, the prosecution of a given crime may become considerably more difficult or expensive. Clearly, the utter denial of access to this evidence when held by the press could impose significant costs on society." 28 STAN. L. REV. 957, 973-974.

¹¹One commentator opined that the same governmental interest found to be compelling in *Branzburg* was involved in the instant case, reasoning that, "[a]lthough *Branzburg* did stress the grand jury's investigative needs, it is unconvincing to attempt to distinguish it from *Stanford Daily* solely on the grounds that *Stanford Daily* involved searches carried out by law enforcement officials rather than by grand juries. In investigations carried out both by grand juries and by law enforcement officials, the object is in most cases identical: the 'securing of the safety of the person and property of the individual' by the detection and prevention of crime." Note, 86 HARV. L. REV. 1317, 1332 (1973). Similarly, Professor Murasky said that the Delaware court in *In re McGowan*, 298 A.2d 339 (1972) had "accurately observed that the investigatory function of the modern grand jury and of the prosecutor are substantially equivalent, making difficult the articulation of a defensible distinction between them" D. MURASKY, *The Journalist's Privilege: Branzburg and Its Aftermath*, 52 TEX. L. REV. 829, 885 (1974) [hereinafter "Murasky"].

As in *Branzburg*, there was no substantial evidence that those searches permitted under the lower courts' rule in this case would hamper newsgathering efforts; the type of affidavits given weight herein as proof of a potential chilling effect were heavily discounted in *Branzburg*. 86 HARV. L. REV. at 1332 and n.89.

These similarities cast doubt on the provision for special treatment for newsgathering interests in search warrant cases. *Id.* at 1332.

As in *Branzburg*, a refusal to grant the qualified privilege requested here will not threaten the vast bulk of confidential relationships between reporters and their sources. (408 U.S. 691.) As in the grand jury situation, a search warrant is directed only to materials relevant to an investigation. Moreover, confidential sources or materials rarely, if ever, will be the object of a search since they normally require personal testimony; hard evidence, such as original communiques and outtakes of public happenings, are the likely objects of a search warrant.¹²

¹²See, *Blasi*, *supra* note 3, at 61, 210-212, 238-244, 247-248, 250-251, 253; note 10 *supra*; *ALI*, *supra* note 6, at 493. There is a compelling public need for such outtakes in a criminal investigation. News organizations will frequently have the only films and tape recordings, and sometimes even the only photographs, of events such as demonstrations. *Blasi*, *supra* note 3, at 227. The fact that the prosecutor must prove a case beyond a reasonable doubt increases the need to utilize every possible evidentiary source. *Id.* at 238.

Any presumed but unconfirmed reliance by the government on journalists to respond to a subpoena duces tecum, as Respondents urge, can be a grievous error. It is not uncommon for reporters to obtain data by secretly accompanying sources on surreptitious criminal missions or knowingly receiving stolen documents (*Id.* at 242-243), thus making themselves unpublicized accomplices. Furthermore, some publications and television stations now routinely destroy film that might be subpoenaed. *Twentieth Century Fund*, *supra* note 3, at 21.

The First Amendment interests, in any case, are diminished in the normal outtake context involving on-the-scene coverage of mass demonstrations and riots, since in these circumstances news sources are less likely to have established relationships with the reporters or camera operators and any fall-out effect of perceived cooperation is "quite minimal." *Blasi* at 247-248.

Other commentators agree that there is little reason to protect such outtakes. See *Twentieth Century Fund* at 50; *Murasky*, *supra* note 11, at 884 ["the chill imposed by compelling a journalist to disclose information not received in confidence but through personal observation probably will not be substantial"]. They suggest, in fact, that a subpoena might be harmful in such cases since the journalist might be perceived as cooperating with the

The Supreme Court in *Branzburg* observed that the argument that the flow of news will be diminished by compelling reporters to aid the grand jury in a criminal investigation is not irrational nor were the records before the Court silent on the matter. (408 U.S. at 693.) However, the Court was unclear as to how often and to what extent informers are actually deterred from furnishing information. (*Id.*) The "chilling effect" argument has even less to recommend it in a search warrant context. First, since the items sought are not turned over voluntarily, the appearance of aiding the government which is said to be crucial to confidential news sources¹³ is not a factor. Second, as in this case, photographic evidence of crimes commit-

criminal investigation, to the possible detriment of future relationships. *Twentieth Century Fund* at 20; *Murasky* at 884-885.

One commentator noted that as of mid-1974 there already had been nearly two dozen journalist privilege cases decided since *Branzburg*. One conclusion from these cases is that, when courts are presented with the question of the witnessing of a crime or the possession of possible criminal evidence, they usually require the evidence to be given. J. GOODALE, *Branzburg v. Hayes and the Developing Qualified Privilege for Newsmen*, 26 HAST. L. J. 709, 720 (1975) [hereinafter "Goodale"].

¹³The appearance of neutrality by a journalist, rather than any actual breach of a confidence, is more important in dealing with confidential sources. 28 STAN. L. REV. 957, 977, n. 117; *Murasky*, *supra* note 11, at 890-891; *Blasi*, *supra* note 3, at 41-43.

The primary concern of reporters is that their mere cooperation with fact-finding tribunals will alienate sources who demand to know of reporters "whose side are you on?" *Blasi* at 44. In fact, when the press appears to oppose the government, it in some respects improves the relationships between reporters and radical sources. *Blasi* at 44-45.

Blasi acknowledges that "ordinarily the adverse effect on source relationships is a function of the mere fact of cooperation rather than the contents of the testimony." *Blasi* at 216.

It would appear, therefore, that the *ex parte* nature of most search warrants and the lack of voluntary cooperation by the media would be far less harmful to confidential relationships and newsgathering efforts than a subpoena.

ted during a public event rather than confidential documents normally will be the subject of the warrant. Third, the government may not seize any legally-possessed document which falls outside the scope of the warrant. Finally, even the commentators most hostile to the concept of media subpoenas and media searches agree that there is relatively little reason to protect photographs of a public event, whether published or of the outtake variety. (*See* note 12, *supra*.)

The record in *Branzburg* consisted of a number of affidavits from journalists attached to Respondent Caldwell's initial motion to quash, which detailed experiences by such journalists after they had been subpoenaed. (408 U.S. at 693, n. 31.) The Supreme Court noted that, while these affidavits indicated that some newsmen rely a great deal on confidential sources and that some informants are particularly sensitive to the threat of exposure, the evidence failed to demonstrate that there would be a significant constriction of the flow of news to the public if the Court reaffirmed the testimonial obligations of newsmen. (408 U.S. at 693-695.)

Virtually the same untested affidavits, with the same self-serving claims, are relied upon by Respondents herein. (RB 20-24; *see* note 11, *supra*.) It is similarly unclear in this case as to how often and to what extent informers will be deterred from furnishing information to the press.¹⁴

¹⁴The reliance of journalists on confidential materials is uneven both in frequency and manner of use. Over 26% of journalists responding to a survey alleged reliance on regular confidential sources in only 0% to 5% of their stories. *Blasi, supra* note 3,

The argument for a constitutional privilege in *Branzburg*, as here, rested heavily on those cases holding that the infringement of protected First Amendment rights must be no broader than necessary to achieve a permissible governmental purpose. (408 U.S. at 699.) The *Branzburg* Court noted, however, that they were not dealing with a governmental institution that had abused its proper function, and nothing in the record indicated that the grand juries in question were probing at will and without relation to existing need. (408 U.S. at 699-700.) Nor did the grand juries attempt to invade protected First Amendment rights by forcing wholesale disclosure of names and organizational affiliations for a purpose that was not germane to the determination of whether a crime had been committed. (408 U.S. at 700.) In any case, the Court said, the investigative power of the grand jury must be necessarily broad if its public responsibility is to be adequately discharged. (*Id.*) Similar considerations dispose of Respondents' argument in this case.¹⁵

at 21. Nearly half asserted such reliance in 10% or fewer of their stories. *Id.* The quantity and quality of the information given to the press is far less than commonly believed. *Id.* at 40.

For hot, hard news by the local broadcast media, the importance of confidential information lies not so much in gathering news as in simply assessing the accuracy and importance of data received from nonconfidential sources. *Id.* at 26. Many journalists are suspicious of all confidential information, partly because sources are more willing to lie in off-the-record or not-for-attribution statements. *Id.* at 24. And skepticism has been raised as to whether certain confidential relationships have any value at all to the press or public. *Id.* at 249.

¹⁵Undue invasion of First Amendment rights is protected by the triple requirement that the place to be searched and the things to be seized be particularly described, that the warrant be supported

The *Branzburg* Court pointed out that some of the cases relied upon by the press held that the State's interest must be "compelling" to justify even an indirect burden on First Amendment rights, but found that that test also had been met in *Branzburg* since

"the investigation of crime by the grand jury implements a fundamental governmental role of securing the safety of the person and property of

by traditional probable cause elements, and that the warrant be issued by a neutral magistrate.

A search warrant on the whole is no more disruptive to the press (and may well be less so) than a subpoena when all factors are taken into consideration. See note 3, *supra*. A subpoena provides no greater protection for the exercise of First Amendment rights than a search warrant. *Murasky, supra* note 11, at 886-887; accord, 28 STAN. L. REV. 957, 986-987; 86 HARV. L. REV. 1317, 1324-1327. First, there is a presumption that the government will limit its search to the terms of the warrant; second, in obtaining the warrant the government must demonstrate probable cause to believe a crime has been or is being committed and that the premises or person named therein has evidence of the crime. *Murasky* at 887. These prerequisites the *Branzburg* Court refused to impose on the issuance of grand jury subpoenas, although it was urged to do so. *Id.*

In addition, both processes have judicial input because only a neutral, detached judicial officer may issue a warrant. 28 STAN. L. REV. at 986; cf., *Johnson v. United States*, 333 U.S. 10, 14 (1948).

Preindictment subpoenas issued to third parties, on the other hand, are likely to be very broad, since frequently neither the grand jury nor the prosecutor has identified the particular persons or crimes for which an indictment will be sought; therefore, the courts have imposed few fourth amendment constraints on their breadth or subject matter. 86 HARV. L. REV. at 1324-1325.

The grand jury subpoena upheld in *Branzburg* can be potentially as intrusive as the broadest search warrant. For example, in the early 1970's federal authorities subpoenaed the complete record of all correspondence, memoranda, notes, and telephone calls made by CBS producers in an 18-month period in connection with a news program dealing with the Black Panther Party. *Twentieth Century Fund, supra* note 3, at 62.

Similarly broad grand jury subpoenas were issued to *Time*, *Life*, and *Newsweek* magazines for all unedited files and unused pictures dealing with the radical Weathermen and to a *New York Times* reporter for his notes and tape recordings of Black Panther Party members during the preceding year. *Twentieth Century Fund* at 62-63.

the citizen, and . . . that calling reporters to give testimony in the manner and for the reasons that other citizens are called 'bears a reasonable relationship to the achievement of the governmental purpose asserted as its justification.' *Bates v. Little Rock, supra*, 361 U.S. at 525, 80 S.Ct. at 417. . . ." (408 U.S. at 700-701.)

By the same token, the investigation of crime by the petitioners herein implements a fundamental governmental role. (See notes 10, 11, *supra*.) Utilizing a search warrant whenever immediacy and secrecy factors are involved or whenever the need for immediacy and secrecy is unclear bears a reasonable relationship to the achievement of this governmental purpose.

The Court in *Branzburg* noted that similar considerations disposed of the journalists' claims that preliminary to requiring the grand jury appearance, the State must make certain factual showings. (408 U.S. at 701-702.)¹⁰ The role of a grand jury as an impor-

¹⁰Respondents argue that a case-by-case balancing test must be used (RB 21, 25-26), despite its rejection by the Court's plurality opinion in *Branzburg* (28 STAN. L. REV. 957, 975, 1000-1001; *Murasky, supra* note 3, at 875). Since *Branzburg*, this Court has denied review in at least two cases involving the refusal of journalists to testify in criminal investigatory proceedings where the lower courts declined to engage in any balancing of interests on the particular facts. *Lightman v. State*, 294 A.2d 149, *aff'd*, 295 A.2d 212 (1972), *cert. denied*, 411 U.S. 951 (1973); *In re Bridge*, 295 A.2d 3 (1972), *cert. denied*, 410 U.S. 991 (1973).

The prevailing rule, as these cases exemplify, is that in cases involving witnessing of a crime, tapes containing evidence of criminal behavior, or evidence useful to a criminal defendant, the courts have not required any balancing of interests; they have not inquired at any length into the relevance of the information nor whether alternative means to obtain the information exist. See,

tant instrument of effective law enforcement necessarily included an investigatory function and to this end it must call witnesses in the manner best needed to perform its task. Society's interest is best served, the Court said, by a thorough and extensive investigation, and the investigation is not fully carried out until every available clue has been run down and all witnesses examined in every proper way. (*Id.*) Similarly, in this case, the use of a search warrant must not be hampered by the need to investigate and make time consuming factual showings unrelated to the cru-

Murasky at 889; *People v. Dan*, 342 N.Y.S.2d 731 (1973) [reporters witnessed crimes during Attica prison riots]; *State v. Knops*, 183 N.W.2d 93 (1971) [source knew names of the persons responsible for a university bombing which killed a student]; *United States v. Liddy*, 354 F.Supp. 208 (D.D.C. 1972) [interview tapes might impeach a witness against a criminal defendant]; *In re McGowan*, 298 A.2d 339 (1972), *rev'd on procedural grounds*, 303 A.2d 645 (1973) [photographs of a campus demonstration].

In *Farr v. Superior Court*, 22 Cal.App.3d 60, 99 Cal.Rptr. 342 (1971), *cert. denied*, 409 U.S. 1011 (1972), a journalist was held in contempt for not revealing the identity of sources who had violated a gag order in the Manson murder trial although the less drastic alternative of ordering a new trial if convictions resulted clearly was an option.

Even if balancing were required under *Branzburg*, the burden would be on Respondents (not Petitioners) to show (a) the irrelevance of the photographs sought, (b) that the evidence or process would further no compelling state interest, or (c) that the evidence is not otherwise required pursuant to a search warrant. See *Goodale*, *supra* note 12, at 718. On the summary judgment record before this Court, Respondents have failed to affirmatively carry this burden. They rely instead on the understandable omission in the affidavit supporting the search warrant of the apparently superfluous facts concerning the impracticality of using a subpoena in this particular case.

Respondents themselves have failed to show that—in fact—a subpoena was a feasible alternative under the peculiar circumstances of this case. The record is to the contrary. (See App. 149-154.)

cial questions of whether seizable items can be found in a particular place at a particular time.¹⁷

The same practical considerations weighing against such a qualified privilege in *Branzburg* are equally applicable here. (See 408 U.S. at 702-706.) It cannot be predicted in advance when and in what circumstances the media would be subject to search and seizure. Therefore, allowing a search to be carried out whenever an adequate showing of impracticality is made *ex parte* to a magistrate is hardly a satisfactory solution to the problems alleged by Respondents.¹⁸ Furthermore, the administration of a journalist's privilege concerning search and seizure would present as many practical and conceptual difficulties as the

¹⁷Respondents argue that journalists are inherently trustworthy individuals (RB 32-33, 36), an implausible assumption on its face and one disproved by experience. See notes 3, 12, *supra*.

Respondents further argue, without any support in the record, that it would be a rare case where a showing of urgency could not be made to the magistrate (RB 35, n. 20) and any delay would be brief (RB 34). Respondents forget that the adverse effect of the qualified privilege they urge occurs not in those easy cases where all conditions already are met but rather in those difficult situations where the need for secrecy or immediate action is not particularly clear.

It would be unusual for professional journalists to publicly state their intent to destroy incriminating photographic evidence, as the *Stanford Daily* did in this case, although it appears that many journalists no longer will cooperate with the government for a variety of reasons and will routinely destroy evidence. See, *Blasi*, *supra* note 3, at 29-31, 36-37; *Twentieth Century Fund*, *supra* note 3, at 21, 51, 58-59, 61-62.

¹⁸A *fortiori* any search has the same potential for abridging freedom of speech that Respondents claim for a student newspaper. Any home, car, and office may contain materials as sensitive or confidential as Respondents allege were present. First and Fourth Amendment claims of privacy and confidentiality equal to, if not more compelling than, that of Respondents can be raised by the attorney whose bank records are taken [see *Burrows v. Superior Court*, 13 Cal.3d 238, 118 Cal.Rptr. 166, 529 P.2d 590

Branzburg Court envisioned. As in *Branzburg*, it would be necessary sooner or later to define those categories of newsmen who qualified for the exemption, "a questionable procedure in light of traditional doctrine that liberty of the press is the right of the lonely pamphleteer who uses carbon paper or mimeograph just as much as of the large metropolitan publisher". (408 U.S. at 704.)

The danger that such an exemption might be claimed by groups that set up or use newspapers in order to engage in criminal activity and therefore to be insulated from search and seizure was recognized by the *Bransburg* Court. (See 408 U.S. at 705, n. 40.)¹⁹

(1975)] or the person whose records of telephone calls were handed over by the telephone company [see *People v. McKunes*, 51 Cal.App.3d 487, 124 Cal.Rptr. 126 (1975)].

Exempting newspapers or third parties from the possibility of a search is simply nonresponsive to the problems alleged by Respondents. If a policy change is necessary, it should be a more particularized one emanating from the legislative bodies of federal and state jurisdictions.

¹⁹The potential problem is demonstrated by organizational peculiarities of some underground news organizations. The underground press defies a precise definition, swinging from political tracts to pornographic trash. It embraces 300 to 350 newspapers plus about 200 sporadic publications, sharing a style that is irreverent, tolerant of drugs, sexually explicit, oriented toward the political left, and anti-establishment. *Twentieth Century Fund*, *supra* note 3, at 34. The local underground newspaper office not infrequently serves as a gathering center for all adherents to an unconventional political orthodoxy or lifestyle, and large numbers of these persons may, at some time or another, write something for the paper. *Blasi*, *supra* note 3, at 280. When an edition is being prepared, anyone who wanders into the shop is free to help, sometimes even contributing copy. *Twentieth Century Fund* at 78.

Professor Blasi warned against "erecting a constitutional shield that would immunize an entire political movement or subculture from normal testimonial obligations." *Blasi* at 280. Similar warning flags must be raised against creating media sanctuaries virtually free from *ex parte* search warrants and thus serving the interests of mobsters, terrorists, or run-of-the-mill criminals.

The *Branzburg* Court was not insensitive to the legitimate needs of the press, but invited the federal and state governments to fashion an appropriate remedy:

"At the federal level, Congress has freedom to determine whether a statutory newsman's privilege is necessary and desirable and to fashion standards and rules as narrow or broad as deemed necessary to deal with the evil discerned and, equally important, to refashion those rules as experience from time to time may dictate. There is also merit in leaving state legislatures free, within First Amendment limits, to fashion their own standards in light of the conditions and problems with respect to the relations between law enforcement officials and press in their own areas. . . ." (408 U.S. at 706.)

The same considerations apply to this case. A variety of responses, from maintaining the status quo to fully exempting news organization from any search and seizure, are available to federal and state governments.²⁰ It is neither appropriate nor wise for this

²⁰The most comprehensive and detailed one is found in The American Law Institute's A MODEL CODE OF PRE-ARREST PROCEDURE (1975). The ALI proposed a model search warrant statute which regulates seizure of writings made solely for private use or communication. *Id.* at 124, 504-505.

In addition, the ALI proposed a new procedure for the handling of intermingled documents and a prompt adversary hearing on the return of impounded or removed documents. *Id.* at 129, 134-137. (Warrants for illegally possessed pictures and literature are treated separately. *Id.* at 138-139.)

In initially endeavoring to seek and identify the documents without going through other documents with which they are intermingled, the executing officer, it is suggested, might ask the possessor of the documents to pick out those covered by the warrant. *Id.* at 136.

Court to freeze into constitutional law an inflexible rule that resort must be had to a subpoena in lieu of a search warrant, since less drastic alternatives exist for legislative consideration.

III.

THE SEARCH WARRANT WAS REASONABLE UNDER A FOURTH AMENDMENT ANALYSIS

Respondents briefly touch on the Fourth Amendment aspects of the case as opposed to any First Amendment interests. (RB 40-49.) Respondents erroneously assert that there is no authority for third-party searches and that those courts which dealt with the seizure of evidence from third-parties condemned the practice. (RB 43 and n. 23.) The cases which Respondents rely upon, however, are no authority:

"[B]ecause these holdings dealt with warrantless searches and because they rested on the now discredited doctrine that 'mere evidence' was immune from seizure, *see* *Warden v. Hayden*, 387 U.S. 294 (1967), they were of only limited guidance in *Stanford Daily*, which involved a warranted search." 86 HARV. L. REV. 1317, 1319, n. 15.

See, also, the discussion at pages 31 to 32 of Petitioners' brief. The Harvard Law Review commentator further states:

"In the past, problems relating to the scope of third party searches have usually been presented to courts in the context of an accused's objecting to the introduction of the fruits of a search of a

third party's property. When an accused has been found to lack standing . . . , courts have failed to reach the merits of the third party search issues.

. . .

"The Omnibus Crime Control and Safe Streets Act of 1968, Title III, § 802, 18 U.S.C. § 2515 (1970) does grant statutory standing to federal grand jury witnesses, even though not suspects, to object to questioning based on illegal wiretapping of their conversations. . . ." *Id.* at n. 13.

In addition to the third-party cases cited by Petitioners in their brief at pages 31 to 33 where such searches were found permissible, reference can be made to many other cases which implicitly recognize the validity of a third-party search as a general proposition.²¹

²¹*See*, notes 3, 18, *supra*; *see also* *Wong Sun v. United States*, 371 U.S. 471 (1963) [no basis for suspicion that James Wah Toy was a narcotics dealer upon his warrantless arrest; his statements were unlawfully seized]; *Mancusi v. DeForte*, 392 U.S. 2120 (1968) [union official had personal Fourth Amendment standing to object to alleged unreasonable search and seizure of union records from office shared with other union officials; search of office without a search warrant on the basis of New York district attorney's subpoena duces tecum was held unreasonable]; *Terry v. State of Ohio*, 392 U.S. 1 (1968) [pat down search affirmed where circumstances only warranted further investigation]; *Alderman v. United States*, 394 U.S. 165 (1969) [government informed the court that the illegal electronic surveillance in question was carried on only at premises owned by Petitioner Alderisio's associates or by firms which employed him, that this petitioner did not have desk space at the subject premises, and that the other petitioner had no interest in the places which were the object of the surveillance]; *Wyman v. James*, 400 U.S. 309 (1971) [mother receiving AFDC relief may not refuse warrantless periodic home visits as a condition for the continuance of assistance]; *Gelbard v. United States*, 408 U.S. 41 (1972) [alleged illegal wiretapping and electronic surveillance; petitioners were called before a federal grand jury to be questioned about third parties based upon petitioners' intercepted telephone conversations]; *United States v. Robinson*, 414 U.S. 218 (1973) [where officer had probable cause to arrest de-

IV.

**NO DEPRIVATION OF A CIVIL RIGHT RESULTED FROM
ANY CONDUCT OF THE POLICE PETITIONERS**

Respondents fail to answer Petitioners' point that a Section 1983 action must be analyzed in accordance with tort principles and that any given defendant's conduct must be a proximate cause of the claimed constitutional deprivation. *Monroe v. Pape*, 365 U.S. 167 (1961); *Madison v. Manter*, 441 F.2d 537 (1st Cir. 1971); *Hoffman v. Holden*, 268 F.2d 280 (9th Cir. 1959), disapproved on other grounds in *Cohen v. Norris*, 300 F.2d 24 (9th Cir. 1962).

Police Petitioners contend that none of their actions were a proximate cause of any Section 1983 violation. This position is supported by *Madison v. Manter*, *supra*, which involved the issuance of a search warrant and a claim that the police defendants knew or should have known that there was insufficient probable cause. The *Madison* Court held that the acts of the police officers were not the cause of the deprivation.²²

defendant for operating a motor vehicle after revocation of his operator's permit, inspection of a crumpled cigarette package found during search of the defendant's person and seizure of heroin capsules were permissible]; *United States v. Infanson*, 235 F.2d 318 (1956) [photographs of defendant seized from woman who became defendant's wife after the seizure and where premises did not belong to defendant were properly admitted as evidence against defendant]; *Clarke v. Neil*, 427 F.2d 1322 (1970) [warrantless search and seizure of suspect's suit at nonsuspect cleaning shop was justified]; *In re Grand Jury Proceedings, Harrisburg, Pennsylvania*, 450 F.2d 199 (1971) [immunized witness could not be examined by grand jury by way of questions based on information obtained through illegal wiretapping].

²²The Court of Appeals stated that this issue was raised for the first time on appeal; however, the issue was raised in the district court, *see* App. 47, 48, 50, 51 (answer of police defendants), 193, 194, 195, 196 (motion for summary judgment by police officers after initial judgment vacated); in any event, the matter goes to subject-matter jurisdiction and is not waived.

In *Hoffman v. Holden*, *supra*, the Court of Appeals held that the steps taken preliminary to the issuance of a court order normally are not the cause of any deprivation but rather, that the order itself is the proximate cause. Similarly, the act of executing a court order is not a cause of a deprivation. *Hoffman v. Holden*, *supra*; *John v. Gibson*, 270 F.2d 36 (9th Cir. 1959); *Commonwealth of Pennsylvania ex rel. Feiling v. Sincavage*, 439 F.2d 1133 (3rd Cir. 1971); *Thompson v. Baker*, 133 F.Supp. 247 (W.D. Ark. 1955).

The district court in *Thompson v. Baker*, *supra*, made the following observation in granting the constable's motion to dismiss, at pp. 250-251:

"It is probable that the allegations of plaintiffs' complaint are sufficient to charge the defendant, W. A. Baker, Justice of the Peace, with a violation of their constitutional rights, in that he allegedly issued writs of garnishment against plaintiffs' employers without the filing of suits by plaintiffs' creditors against them and without any notice whatsoever to the plaintiffs. . . .

"However, there is a serious question as to whether the plaintiffs' allegations in the complaint are sufficient to charge the defendant, R. T. Hoyle, Constable, with a violation of plaintiffs' civil rights. Insofar as the complaint discloses, the only action taken by the defendant, R. T. Hoyle, was in serving writs of garnishment against plaintiffs' employers. . . . [T]he question is not whether the state law has been followed; rather the question is whether the plaintiffs have been denied due process of law, as guaranteed by the Constitution of the United States, by reason of the action of the defendant Hoyle. . . ."

Instead of recognizing that there is a split of judicial authority as to whether judges acting within their judicial function are immune from equitable suits under Section 1983, Respondents assert that no such immunity exists and cite a number of cases for that proposition. However, the cases cited, for the most part, deal with public officials with the power to control a particular situation, rather than individuals who have a mandatory duty to follow and no control.²³

It is submitted that regardless of whether or not the magistrate herein could have claimed judicial immunity, the derivative judicial immunity should be afforded to these police officers since they obeyed a court order fair on its face and any policy reason for not affording immunity to the magistrate has nothing to do with policemen who do not exceed the scope of the order. *Thompson v. Baker, supra*; see also, *Campbell v. Glenwood Hills Hospital, Inc.*, 224 F.Supp. 27 (D.C. Minn. 1963).

In summary, the only tests which should be applied to policemen in this context are whether the court order is fair on its face and whether the policemen follow its terms. Any other tests are unnecessary and unfair, for policemen do not and cannot issue search warrants.

²³See, for example, *Rowley v. McMillan*, 502 F.2d 1326 (4th Cir. 1974), police officers had control over who was allowed attendance to "Billy Graham Day"; *Safeguard Mutual Ins. Co. v. Miller*, 472 F.2d 732 (3rd Cir. 1973), insurance company suing state insurance agency which had control over violations; *Hadnott v. Amos*, 394 U.S. 358 (1969), state officials had control over election ballots; *Brown v. Board of Education*, 347 U.S. 483 (1954), school boards had control over their schools.

Finally, Respondents' assertion that Chief Zurcher was a proper party to this case is incorrect. Respondents maintain that *Rizzo v. Goode*, 423 U.S. 362 (1976) "could not be more different" (RB 54, n. 29) than the instant case. However, *Rizzo* is dispositive on this issue. Chief Zurcher did not know of the search, did not participate in it and the answer filed in his behalf did not state that he would participate in securing similar search warrants.²⁴

Accordingly, no cause of action was stated against any of the policemen, and, alternatively, they should be protected by judicial immunity herein.

V.

"MANIFEST INJUSTICE" SHOULD BE CONSIDERED BY THE COURT HEREIN FOR IT IS APPARENT THAT SUCH WILL RESULT UNDER RESPONDENTS' VIEW OF RETROACTIVITY OF THE ATTORNEY'S FEES AWARD ACT OF 1976

Petitioners pointed out in their opening brief that neither the Act nor its legislative history clearly indicates that fees should be awarded for services rendered long prior to the Act's effective date. Rather, the history shows that it is retroactive only to the extent of pending cases being capable of fee awards and that it should not be applied retroactively herein in that such would result in "manifest injustice" pursuant to this Court's decision in *Bradley v. Richmond School Board*, 416 U.S. 696 (1974).

²⁴Respondents do not address the issue of the inapplicability of respondeat superior liability in Sec. 1983 cases. Again, this issue was presented to the district court, see note 22 above.

Respondents reply that consideration of "manifest injustice" is not permitted by the *Bradley* decision since such is only done where the legislative directive is uncertain and that the legislative directive is clear and explicit with regard to retroactive application of this Act. (Respondents' Brief, pp. 55, 56.)

However, Respondents have not answered the narrowly drawn issue presented by Petitioners, for the only legislative history cited by Respondents is the following:

"In accordance with applicable decisions of the Supreme Court, the bill is intended to apply to all cases pending on the date of enactment as well as all future cases. *Bradley v. Richmond School Board*, 416 U.S. 696 (1974).' (H.R. Rep., at 4, n. 6)." (Respondents' Brief, pp. 55, 56.)

Respondents then equate this statement with the proposition that services rendered long prior to the effective date of the Act are to be compensated as well as services rendered after its effective date for pending cases. However, it is clear that the history of the Act does not state that which Respondents claim it does and that, accordingly, the will of Congress is silent on this point, or at best unclear.²⁵

²⁵Indeed, part of the legislative history seems to recognize limited retroactivity:

"[I]t would apply to cases now pending, for the simple reason that if that were not the case, the award of fees would depend on the date that the case is filed. I do not think that is the basis on which a determination is made. *To that extent, it is retroactive.* Pending cases could receive an award of reasonable fees." 122 Cong. Rec. H 12155 (daily ed. October 1, 1976) (remarks by Rep. Anderson) (Emphasis added)

Accordingly, consideration of the "manifest injustice" proposition is, in fact, warranted by this Court, pursuant to *Bradley v. Richmond School Board*, *supra*.

Regardless of whether "manifest injustice" is considered by this Court, it is clear that many federal courts are in fact looking to the equities present in any given case when deciding whether to award fees, based upon the Act, for services rendered prior to its enactment. Respondents sweepingly assert that every other federal court deciding the question has compensated services rendered prior to enactment of the Act.²⁶ (Respondents' Brief, pp. 58, 59.) However, they have failed to inform this Court that many of the lower courts have in fact recognized that fees are improper where special circumstances exist which would make such an award unjust and have examined or re-examined the record in such cases in order to make such a determination. *See, for example, Wharton v. Knafel*, 562 F.2d 550 (8th Cir. 1977); *Beazer v. New York City Transit Authority*, 558 F.2d 97 (2nd Cir. 1977); *Wade v. Mississippi Co-Op Extension Service*, 424 F.Supp. 1242 (N.D. Miss. 1976).

²⁶Many of the cases cited by Respondents involved clear-cut wrongdoing and no special circumstances; for example, see *Alicia Rosado v. Garcia Santiago*, 562 F.2d 114 (1st Cir. 1977), involving a clearly improper firing of a state agency employee; *Seals v. Quarterly County Court*, 562 F.2d 290 (6th Cir. 1977), involving a clear violation of voting rights based upon race; *Hodge v. Seiler*, 558 F.2d 284 (5th Cir. 1977), refusal to rent based upon race; *Rainey v. Jackson State College*, 551 F.2d 672 (5th Cir. 1977), violation of first amendment right of a teacher; *Martinez Rodriguez v. Jiminez*, 551 F.2d 877 (1st Cir. 1977), prison itself constituted clear deprivation—prison closed; *White v. Crowell*, 434 F.Supp. 1119 (W.D. Tenn. 1977), clearly illegal ad hoc reapportionment.

Such examinations by district courts or re-examinations by courts of appeal are in fact mandated by the legislative history of the Act which states:

"A party seeking to enforce the rights protected by [the Act], if successful, 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.' *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968)." (S. Rep., at p. 4) (Emphasis added)

It is submitted that whatever label or term is used, ultimately an examination of the circumstances of this case is required to determine whether any fee award is just. That examination was not performed by the Court of Appeals herein.

Respondents assert that no "manifest injustice" will occur in this case because while the case was pending in the district court, the "private attorney general" theory then prevailed in the Northern District of California and that the Petitioners' expectations could hardly have been frustrated by the Act.

However, Respondents admit, at n. 32, p. 57 of their brief, that at the time of the search in question, as opposed to the subsequent lawsuit, the award of fees to a successful Civil Rights Act plaintiff was uncertain. They then argue that the fee award herein was predicated upon Petitioners' decision to contest this suit. Such a statement is false and is refuted by the record herein and Respondents' own brief before the Court of Appeals.

No hearing was ever held on an issue of "bad faith" defense of the district court case. The district court based its award on the now-defunct "private attorney general" theory. In fact, Respondents' brief before the Court of Appeals recognized that the decision of this Court in *Alyeska Pipeline Service Co. v. The Wilderness Society*, 421 U.S. 240 (1975), undermined the district court's award of fees and requested that the case be remanded to the district court for a hearing on the only ground left open to them, namely, that the defense of this action was allegedly conducted in bad faith, vexatiously, wantonly, or for oppressive reasons. Such a hearing never took place. Furthermore, the statement that the fee award herein stems from contesting the suit is illogical and unwarranted where the case involved a question of first impression in which the constitutional guideline had not yet been articulated by any court and where the search complied with law existing at the time. Following Respondents' rationale, a defendant would be better off to confess judgment in any given situation rather than to file an answer and proceed. Such is not the law, for "reasonable resistance" in the defense of an action is always permitted. *Bridgeport Guardians, Inc. v. Members of Bridgeport Civil Service Comm.*, 497 F.2d 1113 (2nd Cir. 1974), *cert. den.* 421 U.S. 991 (1975).

Respondents also assert that no "manifest injustice" will result herein in that California Government Code, Section 825 is available to indemnify the individual defendants. However, Respondents fail to point out

that such indemnification is not automatic, that Section 825 by its very terms purports to indemnify against judgments and settlements and no mention is made in the statute of attorney's fees or costs, and what impact the proposed rule would have on those states without such indemnification legislation.²⁷

Also, public employees who are subject to an imposition of attorney's fees, either initially or finally, will act with indecision in the future for fear of retribution either for themselves personally or for their employer and such a result is particularly unjust when the conduct complained of complied with existing law. It is grossly unfair and unreasonable that a public employee acting in good faith and obeying a court order is subjected to a personal judgment for violating a citizen's constitutional rights along with a monetary penalty, in the form of attorney's fees, in addition.²⁸

²⁷Calif. Gov't. Code Sec. 824, requires a finding that an employee was acting in the course and scope *before* indemnification is permitted. Public employees will still have the dread of a lawsuit and its attendant cost and notoriety, hanging over their heads until and unless the public entity in fact makes a determination of acts within the course and scope of employment.

²⁸Police Petitioners also adopt the arguments of their Co-Petitioners that common law immunities are not abrogated by the Act. See, *Universal Amusement Co., Inc. v. Vance*, 559 F.2d 1286 (5th Cir. 1977); *Skchan v. Board of Trustees of Bloomsburg State*, 436 F.Supp. 657 (M.D. Pa. 1977).

CONCLUSION

Petitioners respectfully request that the judgment of the Court of Appeals be reversed and the case dismissed.

Dated, County of Santa Clara, California,
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JAN 16 1978

MICHAEL RODAK, JR., CLERK

Nos. 76-1484 and 76-1600

In the Supreme Court of the United States

OCTOBER TERM, 1977

JAMES ZURCHER, ETC., ET AL., PETITIONERS

v.

THE STANFORD DAILY, ET AL.

LOUIS P. BERGNA, DISTRICT ATTORNEY, AND
CRAIG BROWN, PETITIONERS

v.

THE STANFORD DAILY, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF
OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1484

JAMES ZURCHER, ETC., ET AL., PETITIONERS

v.

THE STANFORD DAILY, ET AL.

No. 76-1600

LOUIS P. BERGNA, DISTRICT ATTORNEY, AND
CRAIG BROWN, PETITIONERS

v.

THE STANFORD DAILY, ET AL.

*ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF
OF APPEALS FOR THE NINTH CIRCUIT*

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's request,
received on December 15, 1977.

QUESTIONS PRESENTED

1. Whether a search of the office of a party not sus-
pected of a crime, in particular, a search of the office

(1)

of a student newspaper, pursuant to a warrant supported by probable cause, is unreasonable under the Fourth Amendment, unless before conducting the search, law enforcement officers have attempted by subpoena duces tecum to obtain the materials they seek or have demonstrated to a magistrate that a subpoena would be impractical.

2. Whether the Civil Rights Attorney's Fees Award Act authorizes the award of fees in this case, although the services compensated were performed before the Act became law.

STATEMENT

1. Shortly before 6 p.m. on April 9, 1971, officers of the Palo Alto Police Department went to the Stanford University Hospital in response to a request from the hospital director that the police remove a group of demonstrators who had occupied the administrative offices of the hospital since the previous afternoon (A. 170-171, 176-177, 180-182). When the police arrived, they found that the demonstrators had chained and barricaded the glass doors at both ends of the hall adjacent to the administrative office area (A. 172). After a series of unsuccessful attempts to persuade the demonstrators to leave peacefully, police officers took forcible measures to gain entry through the doors at the west end of the corridor (A. 170-171, 177-178, 180, 182). A number of reporters, photographers and bystanders gathered at that end of the hall to watch the police evacuation efforts (Pet. App.

12).¹ As the police broke through the barricade blocking the west doorway, a number of demonstrators, armed with sticks and clubs, rushed out of the doors at the east end of the corridor and attacked a contingent of nine police officers positioned there. All nine officers were injured in the ensuing struggle, some seriously (A. 34, 104, 172-175, 179; Pet. App. 11). The police were able to identify only two of their assailants (A. 175, 179; Pet. App. 12).

On Sunday, April 11, 1971, respondent, *The Stanford Daily* ("Daily"), a newspaper published by students at Stanford University (A. 16), published a special edition containing articles and photographs devoted to the hospital protest and the violent clash between demonstrators and police (A. 20, 34-35, 100-116, 152). The published photographs carried the byline of a member of the *Daily's* staff (A. 35), and indicated that the *Daily's* photographer had been stationed near the scene of the assault upon the officers at the east end of the hospital hallway (A. 152-153; Pet. App. 12).

On April 12, 1971, the Santa Clara County District Attorney's office secured a warrant authorizing an immediate search of the *Daily's* offices for negatives, film, and pictures showing the events and occurrences

¹ The appendices to the petitions in these consolidated cases are identical, even as to pagination. Where it is necessary to refer to the petitions separately, the petition in No. 76-1484 will be cited as "Zurcher Pet." and the petition in No. 76-1600 as "Bergna Pet."

at Stanford University Hospital on the evening of April 9, 1971 (A. 31-32; Pet. App. 12). The police officer's affidavit presented to the issuing magistrate in support of the warrant contained no evidence or allegation that any member of the *Daily* staff was involved in the unlawful activities at the hospital (A. 33-35; Pet. App. 12).

At approximately 5:45 p.m. the same day, the search warrant was executed by four members of the Palo Alto Police Department (A. 72-75, 130-132, 136-141, 155-169; Pet. App. 12-13). According to the police officers, the search lasted about 15 minutes (A. 158, 162, 165, 169). The police examined the *Daily's* photograph laboratory, file cabinets, desks, and wastepaper baskets. Locked drawers and rooms were left undisturbed (A. 141, 157, 165). Petitioners and respondents disagree over whether the police officers read or scanned any of the written materials located in the *Daily's* offices at the time of the search (A. 75, 132, 140-141, 157, 164-165, 168). Although the officers were apparently in a position to see reporters' notes containing information given in confidence, the police were not advised by *Daily* staff members present during the search that any of the materials examined were confidential in nature (A. 88, 132, 158, 161, 165, 168-169). The search apparently uncovered no useful photographs of the April 9 altercation between police and demonstrators, and the officers departed without seizing any property (A. 27, 43, 53).

2. On May 13, 1971, respondents commenced a civil action in the United States District Court for the

Northern District of California seeking declaratory and injunctive relief under 42 U.S.C. 1983. Respondents alleged that the search of the *Daily's* offices had deprived them, under color of state law, of rights secured by the First, Fourth and Fourteenth Amendments to the United States Constitution (A. 15-35). The district court granted respondents' motion for a declaratory judgment that the search of the *Daily's* offices was illegal; the court denied the request for injunctive relief (Pet. App. C; 353 F. Supp. 124).

The district court held that, before obtaining a search warrant for materials in the possession of a so-called "third-party," i.e., a party not suspected of crime, law enforcement officials are required under the Fourth Amendment to demonstrate to the issuing magistrate not only probable cause to believe that the third party has in his possession evidence of a crime, but also probable cause to believe that a subpoena duces tecum would be an impractical means to obtain that evidence (Pet. App. 26). The court further stated that even where a subpoena is issued and the requisite materials are not produced, the mere failure to comply would not by itself constitute grounds sufficient to support issuance of a search warrant (Pet. App. 27).

Noting that destruction of evidence is a crime under California law, the court suggested that a restraining order would be the appropriate procedural device to use in the event police presented evidence that materials needed for a criminal investigation were in danger of destruction or removal from the juris-

diction (Pet. App. 27). The court declared that a subpoena should be found impractical and a search warrant issued for materials in the possession of a nonsuspect third party "[o]nly if it appears that the materials will be destroyed or removed from the jurisdiction despite the restraining order, or that there simply is not time to obtain a suitable order" (Pet. App. 28).

Finally, the court observed that in assessing the impracticality *vel non* of a subpoena, the magistrate "should consider * * * whether First Amendment interests are involved" (Pet. App. 28). A search of a newspaper office, the court said, "presents an overwhelming threat to the press's ability to gather and disseminate the news" (Pet. App. 32). In addition, the court opined, necessary information may be obtained from the press by means less drastic than a search. Therefore, the court concluded, "[a] search warrant should be permitted only in the rare circumstance where there is a *clear showing* that 1) important materials will be destroyed or removed from the jurisdiction; and 2) a restraining order would be futile" (Pet. App. 33). Since petitioners had not alleged that any member of the *Daily* staff was suspected of a crime, the court explicitly refused to consider whether the same rule should apply in such a situation (Pet. App. 33 n. 15). On the basis of the undisputed facts, the court ruled that the search of the *Daily's* offices was unlawful (Pet. App. 33, 35).²

² The court noted that a Santa Clara County grand jury had convened on the evening of April 12, 1971, soon after the search

On August 10, 1973, the district court concluded that an award of attorney's fees to respondents was appropriate to encourage vindication of important constitutional rights (Pet. App. 49-50). The court later determined that \$47,500 would constitute reasonable compensation for the services performed (Pet. App. 59-71).

The court of appeals affirmed, adopting the opinion of the district court on the Fourth Amendment issue (Pet. App. A; 550 F. 2d 464). With respect to the award of attorney's fees, the court of appeals noted that this Court's decision in *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240, which held that attorney's fees could not ordinarily be awarded by federal courts absent congressional authorization, invalidated the district court's nonstatutory basis for its award. However, the court of appeals held that

warrant was executed. The court was plainly under the impression that local authorities could have issued the *Daily* a subpoena returnable before that grand jury (Pet. App. 13-14). In an affidavit submitted to the district court, however, petitioners sought to demonstrate that a subpoena would have been futile under the circumstances of this case. The affidavit alleged that in October 1969 photographs subpoenaed from the *Daily* had been reported lost or stolen, and that sometime prior to April 1971 the *Daily* had announced in an editorial that it would not retain any potentially incriminating photographic materials (A. 150-152; see A. 117-118 (*Daily* editorial, February 10, 1970)). The court remained unpersuaded, remarking first that the affidavit did not establish probable cause to believe that a subpoena was impractical, and second that the evidence allegedly establishing such probable cause had not been properly presented to the magistrate in affidavits supporting issuance of the search warrant (Pet. App. 33 n. 16).

the intervening passage of the Civil Rights Attorney's Fees Award Act of 1976, Pub. L. 94-559, 90 Stat. 2641, 42 U.S.C. (1976 ed.) 1988, which authorized federal courts to award fees in cases filed under 42 U.S.C. 1983, "revalidated" the district court's judgment awarding fees (Pet. App. 6).

SUMMARY OF ARGUMENT

1. This case involves a challenge to the legality of a search of a student newspaper, pursuant to a warrant issued upon a showing of probable cause. The courts below have awarded respondents a judgment declaring the search to have been illegal because the newspaper was a "third-party" not suspected of complicity in the offenses under investigation, and a warrant therefore should not have been issued in the absence of a showing that the use of a subpoena to acquire the evidence was "impractical." While we recognize that recourse to a subpoena rather than a search can in some cases avoid possibly unnecessary intrusion into personal privacy or risk to interests protected by the First Amendment, we cannot agree that the concerns justify the imposition of a broad procedural barrier to issuance of search warrants such as that adopted by the decision below. Rather, such considerations, which necessarily vary materially from case to case, should be taken into account by the magistrate in issuing the warrant and framing its terms and conditions.

a. Nothing in the language, development, or previous interpretation of the Fourth Amendment indicates that the impracticality of a subpoena must be estab-

lished before a valid warrant may issue authorizing a search of "third-party" premises. The primary evil feared by the Framers of the Fourth Amendment was an unfettered search pursuant to general warrant. Thus motivated, the Framers wrote into the Amendment substantial restrictions on warrants and their issuance. See, e.g., *Stanford v. Texas*, 379 U.S. 476, 481-485. This Court has recognized that those restrictions afford significant protections against unreasonable warranted searches. See, e.g., *United States v. Chadwick*, No. 75-1721, decided June 21, 1977, slip op. 7-8; *United States v. United States District Court*, 407 U.S. 297, 316-317. Neither the courts below nor respondents have been able to adduce any precedent supporting adoption of a "subpoena first" rule as a supplement to the traditional Warrant Clause requirements of a probable cause showing to a neutral magistrate and a specific description of the place to be searched and the things to be seized.

b. Apart from its lack of historical foundation, the result reached below could pose severe problems in implementation. The district court's opinion does not explain what it means by the terms "non-suspect" and "third-party." Nor does the ruling indicate what sort of evidence would suffice to establish a subpoena's impracticality. If the terms "non-suspect" and "third-party" are defined broadly or if the additional showing imposes a heavy burden of proof, legitimate law enforcement needs will suffer. To the extent that the courts below would require the use of subpoenas for obtaining materials from parties possibly engaged in

criminal conduct or potentially sympathetic with suspects, a serious and unjustifiable risk of loss of evidence would be created.

The lower courts' ruling is also deficient in its failure to recognize the practical difficulties involved in mandatory increased reliance upon subpoenas. In many federal jurisdictions, grand juries meet only infrequently. Initial resort to a subpoena will often mean significant delay in a criminal investigation. If compliance is postponed until after an unsuccessful judicial challenge to the subpoena's validity, further delay will be inevitable.

Thus, the costs associated with adoption of the rule propounded by the courts below could be high. Yet the corresponding benefits appear minimal. Prosecutors and police officers seldom, if ever, proceed by search warrant when they are reasonably confident that the materials they seek may be acquired through informal request or by subpoena. When executive officials do apply for a warrant, the Fourth Amendment's provisions protect against arbitrary invasion of a citizen's privacy. In addition, the issuing magistrate may in individual cases impose special restrictions on the manner of execution of a search, thereby limiting its intrusiveness to that justified by legitimate law enforcement concerns. The position summarized here is consistent with this Court's rejection of *per se* rules in the Fourth Amendment context in favor of a case-by-case approach better suited to a balancing of the conflicting interests implicated in

officially authorized searches and seizures. See *South Dakota v. Opperman*, 428 U.S. 364, 373.

c. The fact that the search here in dispute occurred at the offices of a newspaper does not materially affect the argument outlined above. Doubtless, serious First Amendment questions are raised by the search of a newspaper office or any comparable media facility. This Court has acknowledged on a variety of occasions that the protections afforded by the Fourth Amendment must be applied with special stringency in situations where First Amendment values may be at stake. See, e.g., *Roaden v. Kentucky*, 413 U.S. 496; *Marcus v. Search Warrant*, 367 U.S. 717. The careful weighing of interests that the Constitution requires is best accomplished, however, through a neutral magistrate's evaluation of the facts presented in particular warrant applications, not through adoption of a new procedural requirement, indiscriminately applicable whenever First Amendment interests are arguably involved.

The federal government's contention that the "subpoena first" rule fashioned by the courts below is not constitutionally compelled does not reflect a policy judgment that searches of press offices are desirable. On the contrary, no case has been found in which such a search has been conducted under federal auspices. Furthermore, Justice Department guidelines limiting the availability of newsmen's subpoenas evidence a continuing concern that First Amendment liberties be safeguarded. See 28 C.F.R.

50.10. In sum, the Fourth Amendment contemplates protection of freedom of the press, in the search and seizure context, through the guarantees of the Warrant Clause; if additional protections are deemed necessary or wise, they must be instituted by the political branches.

2. If this Court should affirm the decision below on the legality of the search, the award of attorney's fees should also be affirmed. The district court awarded those fees pursuant to a "private attorney general" rationale, now discredited in the wake of *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240. As the court of appeals correctly held, however, the district court's award of attorney's fees was "revalidated" by Congress' enactment of the Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. 94-559, 90 Stat. 2641, 42 U.S.C. (1976 ed.) 1988, during the pendency of this suit in the court of appeals.

In *Bradley v. Richmond School Board*, 416 U.S. 696, this Court affirmed an award of attorney's fees for services performed before the statute authorizing the award was enacted. In that case, the statute's legislative history was ambiguous as to whether the new law's provisions were to be applied to pending cases. Here, by contrast, the congressional intent is clear that the courts were to have authority to award attorney's fees in pending cases. See S. Rep. No. 94-1011, 94th Cong., 2d Sess. 5 (1976); H.R. Rep. No. 94-1558, 95th Cong., 2d Sess. 4 n. 6 (1976).

Moreover, the award of attorney's fees in this case works no injustice. The City of Palo Alto and the County of Santa Clara will be responsible respectively for any judgments against petitioner police officers and district attorneys. As in *Bradley*, the enactment of the statutory authorization of attorney's fees awards did not affect any unconditional right of a public entity to dispense funds as it chose, and did not have any impact on the substantive law of the case. Finally, the award of fees here does not violate any immunity that petitioners enjoy from damage actions. The legislative history of the 1976 statute leaves no uncertainty on this score. See S. Rep. No. 94-1011, *supra*, at 5; H.R. Rep. No. 94-1558, *supra*, at 7.

ARGUMENT

I. THE FOURTH AMENDMENT DOES NOT REQUIRE A SHOWING THAT A SUBPOENA IS IMPRACTICAL BEFORE A WARRANT MAY ISSUE TO SEARCH PREMISES OCCUPIED BY A NONSUSPECT THIRD PARTY

Petitioners challenge the following rule, formulated by the district court and endorsed by the court of appeals: "law enforcement agencies cannot obtain a warrant to conduct a third-party search unless the magistrate has probable cause to believe that a subpoena duces tecum is impractical" (Pet. App. 26). This broad holding constitutes a significant and ill-conceived departure from established Fourth Amendment principles. Neither the language of the Amendment, nor the history of its drafting and adoption,

nor subsequent judicial interpretation of its provisions supports the imposition of this additional prerequisite for the issuance of a valid search warrant. Moreover, the substantial practical difficulties that would attend the administration of such a requirement counsel against its acceptance by this Court.

A. THE RULING BELOW CONFLICTS WITH TRADITIONAL INTERPRETATIONS OF THE FOURTH AMENDMENT

The Fourth Amendment declares:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Amendment thus places important restrictions on the issuance of search warrants. A neutral magistrate must determine, on the basis of sworn allegations, whether a sufficient showing has been made to justify the invasion of privacy that a search or seizure entails. The place to be searched and the persons or things to be seized must be specifically described in the warrant, in order to protect against unfettered police inspection of a person's home, office, or belongings. *Marron v. United States*, 275 U.S. 192, 196. By the same token, the magistrate's participation in the warrant process provides an opportunity for the imposition of salutary limits on the manner and extent of an authorized search. Finally, the warrant itself assures one whose property is subjected to search or

seizure that the executing officer is operating under lawful authority. *Camara v. Municipal Court*, 387 U.S. 523, 532. This Court has recognized repeatedly that these guarantees do afford meaningful safeguards against overreaching conduct by law enforcement officers. See, e.g., *United States v. Chadwick*, No. 75-1721, decided June 21, 1977, slip op. 7-8; *United States v. United States District Court*, 407 U.S. 297, 316-317; *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (plurality opinion); *Johnson v. United States*, 333 U.S. 10, 14; *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 356-357.

Nowhere in the Fourth Amendment, however, is it stated or implied that a sworn demonstration of the impracticality of a subpoena is a precondition for the issuance of a valid search warrant. This is not surprising in light of the history of the constitutional provision. That history, frequently canvassed in the opinions of the Court, reveals that "[t]he Amendment was primarily a reaction to the evils associated with the use of the general warrant in England and the writs of assistance in the Colonies." *Stone v. Powell*, 428 U.S. 465, 482. See also *United States v. Chadwick*, *supra*, slip op. 6, and cases there cited. The principal concern motivating the Framers of the Amendment was a desire to narrow and particularize the permissible scope of search warrants, in order "to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals." *United States v. Martinez-Fuerte*, 428 U.S.

543, 554. No attempt was made to rank, according to the degree of their intrusiveness, the various procedural devices that police might employ in their efforts to acquire information relevant to the investigation of a crime. *A fortiori*, the Framers imposed no requirement that law enforcement officers limit themselves to the least intrusive means by which necessary information might conceivably be obtained.³ Rather, the Framers addressed themselves solely to searches and seizures, and struck a balance whereby "when the State's reason to believe incriminating evidence will be found becomes sufficiently great, the invasion of privacy becomes justified and a warrant to search and seize will issue." *Fisher v. United States*, 425 U.S. 391, 400.

A study of the origins of the Fourth Amendment discloses no intention to create separate and distinct categories of persons to whom varying measures of constitutional protection would apply, and the lower courts' differentiation in this case between suspects and nonsuspects finds no support in the historical development of search and seizure law. One respected commentator has stated without qualification that "a warrant may issue to search the premises of anyone, without any showing that the occupant is guilty of any offense whatever." T. Taylor, *Two Studies in Constitutional Interpretation* 48-49 (1969). Similarly, this

³ See *United States v. Martinez-Fuerte*, *supra*, 428 U.S. at 557 n. 12 ("The logic of such elaborate less-restrictive-alternative arguments could raise insuperable barriers to the exercise of virtually all search and seizure powers").

Court has said several times that the Fourth Amendment was designed to protect everyone, "both the innocent and the guilty." *Trupiano v. United States*, 334 U.S. 699, 709. See also *Wyman v. James*, 400 U.S. 309, 317; *Camara v. Municipal Court*, *supra*, 387 U.S. at 530; *McDonald v. United States*, 335 U.S. 451, 453; *Go-Bart Importing Co. v. United States*, *supra*, 282 U.S. at 356. On all these occasions, whether in a civil or criminal context, the Court has not advanced the slightest suggestion that the Fourth Amendment warrant requirements should be administered differently for suspects and non-suspects.

In the only recent judicial decision other than the instant case to consider the matter directly, the Sixth Circuit specifically rejected the argument that the Fourth Amendment rights of innocent third parties are violated when the government fails to utilize a subpoena duces tecum or establish its impracticality before applying for a search warrant. In *United States v. Manufacturers National Bank of Detroit*, 536 F. 2d 699 (C.A. 6), certiorari denied *sub nom. Wingate v. United States*, 429 U.S. 1039, agents of the Federal Bureau of Investigation obtained a warrant to search a bank safety deposit box registered in the names of the wife and daughter of the man the agents suspected of heading a large illegal gambling operation. After the warrant had been executed and the agents had discovered more than \$500,000 in currency, the lessees of the safety deposit box moved for return of the seized property. In affirming the district court's denial of the motion, the court of appeals held

that the warrant was supported by probable cause and that no Fourth Amendment violation had occurred. Expressly disagreeing with the district court's decision in this case, the court concluded (536 F. 2d at 703):

Once it is established that probable cause exists to believe a federal crime has been committed a warrant may issue for the search of any property which the magistrate has probable cause to believe may be the place of concealment of evidence of the crime. The necessity that there be findings of probable cause as to two factors—the commission of a crime and the location of evidence—affords protection from unreasonable searches and seizures, which are the only ones forbidden by the Fourth Amendment.[⁴]

Respondents cite four state cases, none more recent than 1939, in support of their contention that the impracticality of a subpoena must be established before a third party search warrant may properly issue. As the opinion below reveals, these cases do not stand for the proposition asserted by respondents. In *Owens v. Way*, 141 Ga. 796, 82 S.E. 132 (1914), the police officers sought to justify a warrantless search of a third party's premises and seizure of his safe by arguing that the safe contained evidence that could be used to convict the third party's nephew, whom the police had arrested pursuant to a valid warrant. The Georgia

⁴ See also *People ex rel. Carey v. Covelli*, 61 Ill. 2d 394, 336 N.E. 2d 759 (upholding validity of warrant to search belongings of deceased third party).

Supreme Court simply held that the officers' authority under the arrest warrant did not extend so far as to permit seizure of third party property. *Newberry v. Carpenter*, 107 Mich. 567, 65 N.W. 530 (1895), involved a court order authorizing a local procedure to seize the remnants of two boilers that had exploded, destroying the printing plant in which they were located and causing death or injury to numerous persons. Not only was the court order issued on the basis of unsworn allegations, but also the prosecutor's actions did not fall within one of the several categories of permissible seizures explicitly sanctioned by state statute. Hence, in neither case was the search and seizure invalidated by virtue of the courts conclusion that a constitutional provision governing searches should be interpreted to differentiate between suspects and nonsuspects. The other two cases cited by respondents, *People v. Carver*, 172 Misc. 820, 16 N.Y.S. 2d 268 (County Ct. 1939), and *Commodity Manufacturing Co., Inc. v. Moore*, 198 N.Y.S. 45 (Sup. Ct. 1923), are also not in point. The seizures in those cases failed to survive judicial scrutiny either because they were not authorized under state statute or because they involved "mere evidence," as opposed to fruits or instrumentalities, of crime. This latter dubious Fourth Amendment distinction was eventually abandoned by this Court in *Warden v. Hayden*, 387 U.S. 294.⁵

⁵ Respondents also cite (Br. 46) several "due process" cases in which this Court has held some type of prior hearing must be

In short, existing Fourth Amendment jurisprudence amply demonstrates that the constitutional standard for the issuance of a search warrant is met when the magistrate is furnished with probable cause to believe that a crime has been committed and that evidence of that crime will be uncovered in a particular location. The protections of the Amendment do not vary with the identity of the party whose premises are to be searched or with that party's status as a suspect or nonsuspect.⁶ Indeed a warrant may validly issue even where the identity of the owner or occupant of the premises is unknown. See, e.g., *United States v. Besase*, 521 F. 2d 1306, 1308 (C.A. 6); *Hanger v. United States*, 398 F. 2d 91, 99 (C.A. 8), certiorari de-

afforded a citizen before he may be deprived of his property by the government. These cases are plainly inapposite, however, not only because they did not involve the lawfulness of police conduct during a criminal investigation but also because, unlike the procedures there under attack, the issuance of a search warrant *does* require that a substantial prior showing be made before a neutral magistrate.

⁶ The courts below, relying on *Bacon v. United States*, 449 F. 2d 933 (C.A. 9), have attempted to draw an analogy between an arrest of a material witness and a search of the premises of a nonsuspect third party. The comparison is inapposite for two reasons. First, it is doubtful whether the rules regarding the arrest of material witnesses are constitutionally compelled. See Rule 46(b), Fed. R. Crim. P. Second, an arrest and a search are notably disparate in their respective impacts on the individual. Predictably, therefore, the criteria governing arrests and searches have never been equated in constitutional law. See Note, *Search and Seizure of the Media: A Statutory, Fourth Amendment and First Amendment Analysis*, 28 Stan. L. Rev. 957, 995-996 and nn. 222-224 (1976).

nied, 393 U.S. 1119. This result is both expected and correct, because, as one prominent commentator has explained, "[a] search warrant does not run against an individual, but to things in places" T. Taylor, *supra*, at p. 60 (footnote omitted). See also *United States v. Kahn*, 415 U.S. 143, 155 n. 15.

B. THE DECISION BELOW OVERLOOKS SIGNIFICANT DIFFICULTIES AND COSTS ASSOCIATED WITH ITS "THIRD-PARTY" SUBPOENA RULE

The statement of the broad rule adopted by the decision below is deceptively simple, but the rule masks a myriad of problems that would inevitably arise in the course of its application and that did not receive adequate consideration in the opinion. Because of these problems, adoption of the lower courts' innovation in Fourth Amendment law would be unwise, wholly apart from the lack of textual or precedential support for the rule propounded by the decision below.

In conducting a pragmatic inquiry into the desirability of a rule requiring an antecedent magisterial determination of the impracticality of a subpoena as a precondition to the issuance of a warrant to search premises belonging to a nonsuspect, it is necessary to balance the frequency and severity of the evils against which such a procedure would guard with the practical costs that the procedure would impose. We believe that the evil, while perhaps significant in occasional specific cases, is not in fact prevalent—a conclusion supported to some extent by the striking pau-

city of reported cases challenging the propriety of warranted, probable cause searches of "third-party" premises.

It is, moreover, in the nature of things that unnecessary or unjustifiable searches of truly disinterested third parties are rare. We canvassed a number of federal prosecutors' offices in connection with the preparation of this brief and were consistently told that there is a strong preference for proceeding by subpoena or, better yet, by informal request rather than by search whenever it appears feasible to do so (which is almost always in the case of indisputably disinterested third parties such as banks or telephone companies). This preference is predictable and understandable in light of the fact that the warrant mechanism is relatively cumbersome and demanding and that searches perceived as unnecessary by the citizenry can be destructive of police-community relations—considerations that make law enforcement officials unlikely to seek a warrant in the first instance unless they have some reason to fear that less drastic measures will prove inadequate. Respondents themselves cite (Br. 44) cases that exemplify prosecutors' tendency to subpoena files and records rather than attempting to obtain such materials through a judicially authorized search. Since the prosecutor's own interest in the efficient gathering of evidence militates in favor of reliance upon the voluntary cooperation of neutral third parties, it is reasonable to commit the original determination whether to proceed by subpoena or

search warrant to the discretion of those executive officials charged with law enforcement responsibilities.

While the evils perceived as justifying the decision below are thus not ubiquitous, the practical difficulties surrounding its implementation promise to be substantial. Foremost among these is the classification of particular persons as suspects or nonsuspects. We are particularly concerned in this connection with the implication in the opinion below—arising from its use of the analogy to arrests (Pet. App. 25-26)—that it may intend to encompass within the otherwise undefined concept of "third-parties" any person as to whom there is no probable cause to believe he or she is criminally implicated in the offense under investigation. If any new restriction is to be imposed upon the procedures antecedent to third party searches, it is imperative that the "third-party" concept be strictly limited to persons or organizations indisputably free of any culpable connection with the offense or relationship to possible offenders.

The need of police officers to inspect or seize items of private property arises in a vast variety of situations. At times, prosecutors and police may be certain that a given crime has been committed but may not yet have probable cause for an arrest or perhaps may not even have identified any suspects. In such circumstances, police would be hard-pressed to demonstrate that a subpoena is an impractical method of obtaining materials from any particular party. At the same time, the use of subpoenas that the courts

below would require might well result in premature notice to a guilty individual. Police may wish to inspect the premises or property of so-called third parties, not themselves suspected of any complicity in the unlawful conduct under investigation, but known to be related to, or friendly with, the likely perpetrator. Similarly, police may need to search areas belonging to or occupied by presumably innocent third parties, but to which a criminal suspect has or has had ready access. See, e.g., *Simmons v. United States*, 390 U.S. 377; *United States v. Jeffers*, 342 U.S. 48; *United States v. Miguel*, 340 F. 2d 812, 814 n. 2 (C.A. 2), certiorari denied, 382 U.S. 859; *United States v. Fernandez*, 430 F. Supp. 794 (N.D. Cal.). Where, as is often the case, the probable reaction of such third parties to a subpoena or police inquiry is unknown and unknowable, the rule adopted by the courts below would create an unjustifiable risk that valuable evidence would be lost.

The "subpoena first" rule will also require the frequent inclusion of additional material in search warrant applications. It will presumably be necessary in each instance to include, in addition to the constitutionally required specific identification of the place to be searched and things to be seized, some statement indicating the identity of the owners or occupants of the place to be searched and relating what is known of their connection to the crime and to any suspected perpetrators of the crime—information which, as indicated above, may not always be readily available

and which has not heretofore been thought constitutionally required (see *United States v. Kahn*, *supra*, 415 U.S. at 155, n. 15). And where premises of someone arguably a "third-party" are to be searched, prosecutors will confront the difficult task of presenting reliable information on the speculative question of the practicality of a subpoena. The opinion below fails to indicate what sort of evidence would suffice to satisfy this requirement. While such omissions from the analysis in the opinion make it impossible to predict how heavy an additional burden will be imposed on law enforcement officers by the "subpoena first" rule, the concerns expressed above are ones that must be reckoned with.

Apart from any burdens that may be imposed on the warrant procedure itself, the analysis of the opinion below is deficient in failing to consider the difficulties that may be associated with reliance upon subpoenas in many circumstances. As petitioners have indicated (*Bergna Pet.* 6 n. 4, 8 n. 6; *Bergna Br.* 19-20; A. 153-154), the limited functions and availability of grand juries in California and other states⁷ would severely hamper prosecutorial efforts to use

⁷ Since the Fifth Amendment requirement of a grand jury indictment for "capital, or otherwise infamous crime[s]" (see *Green v. United States*, 356 U.S. 165, 183; see also Rule 7(a), Fed. R. Crim. P.) does not apply to the states under the Fourteenth Amendment, *Hurtado v. California*, 110 U.S. 516, cited with approval in *Alexander v. Louisiana*, 405 U.S. 625, 633, the degree of reliance on, and thus availability of, grand juries varies widely from state to state. See *Branzburg v. Hayes*, 408 U.S. 665, 687-688 and nn. 24-25.

subpoenas to the extent that the lower courts' decision seems to envision. Likewise in the federal system, the infrequent meetings of grand juries in a significant number of sparsely populated or geographically large districts—in some districts federal grand juries meet as infrequently as once every 60 days—make routine resort to subpoenas highly problematical. Prosecutors might often be required to issue subpoenas returnable before a grand jury that will not convene for several days or even weeks. The delay inevitably associated with this process is incompatible with the imperatives of effective criminal investigation and the societal interest in prompt resolution of criminal cases reflected in the Speedy Trial Clause of the Sixth Amendment.

We do not mean by the foregoing to suggest that law enforcement authorities should be in any way discouraged from using subpoenas where feasible, or that there are no valuable interests that are served when a subpoena is used rather than a search, or even that there may not be occasions on which it would be appropriate to refuse issuance of a search warrant because it is unreasonable to proceed by those means rather than by subpoena or request for voluntary cooperation. One undeniable benefit of a subpoena, whenever prompt compliance is forthcoming, is that it avoids the necessity for police rummaging that may disclose private materials not subject to inspection or seizure under the terms of the warrant. (In many cases a police request for voluntary production at the time the warrant is served could accom-

plish the same objective, but that will not always be so; here, for example, it appears that the photographs might not have been producible because they did not exist at the time of the search.)

Another cited benefit of the use of the subpoena is that it affords the third party an opportunity to litigate his obligation to supply the requested materials. We recognize that this may be valuable in cases where the subpoenaed party can make a convincing showing that he does not possess the requested materials or that they are subject to some overriding privilege, such as the attorney-client privilege, that shields them from production even though they may contain evidence of a crime.⁸ But the opportunity to litigate prior to seizure or disclosure of the materials is not an unmixed blessing. Litigation is a time-consuming process that is incompatible with the need for expedition in the conduct of criminal investigations. Especially insofar as a party may have objections to production or disclosure rooted in Fourth

⁸ Respondents and the courts below apparently assume that if a subpoena for certain materials is quashed, those materials could not then be obtained by means of a legitimate warranted search. This is not necessarily so. For example, in recognition of the colorable Fifth Amendment self-incrimination objections which may be advanced against the active cooperation necessarily involved in an affirmative response to a subpoena, this Court has approved the use of search warrants for the acquisition of certain materials the production of which might not be subject to compulsion by subpoena. See *Andresen v. Maryland*, 427 U.S. 463; *Boyd v. United States*, 116 U.S. 616. See also *Fisher v. United States*, *supra*.

Amendment considerations, the general liberality with which grand jury subpoenas may be procured and enforced, and the very limited nature of Fourth Amendment objections to them that our legal system countenances, suggest that such objections will ordinarily be found to lack merit. See 86 Harv. L. Rev. 1317, 1324-1326 (1973).⁹

⁹ Thus, although subpoenas are theoretically subject to the Fourth Amendment requirement that the materials sought be described with particularity, see *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 208-209; *Hale v. Henkel*, 201 U.S. 43, in practice the expansive scope of the grand jury's investigative power has been invoked to justify subpoenas of notably broad reach. See, e.g., *Brown v. United States*, 276 U.S. 134; *Wheeler v. United States*, 226 U.S. 478; *In re Grand Jury Subpoena Duces Tecum*, 203 F. Supp. 575 (S.D. N.Y.); *In re Borden Co.*, 75 F. Supp. 857 (N.D. Ill.)

Moreover, issuance of a valid subpoena does not require a probable cause showing that the materials sought constitute evidence of a crime under investigation. The grand jury—or the prosecutor acting alone as agent for the grand jury—may issue a subpoena with no prior judicial scrutiny, and the commands of the Fourth Amendment will be found satisfied by a demonstration of simple relevance of the materials sought to the subject matter under consideration by the grand jury. See *Oklahoma Press Publishing Co. v. Walling*, *supra*, 327 U.S. at 208-209. The very statement of this test reveals one of the incongruities of the ruling below. The validity of a subpoena is tested in part through an evaluation of its connection to an ongoing grand jury inquiry. But, in most instances in which law enforcement officials seek to acquire information, no grand jury investigation of the matter is in progress. Either evidence gathering has not yet proceeded to the point where a prosecutor would present his case to a grand jury, or no request for a grand jury indictment is contemplated. Under such circumstances, assuming a grand jury were convened for the purpose of issuing the sort of subpoenas that the courts below would require, the test of relevancy to a grand jury inquiry would be meaningless.

The courts below assigned great weight to the fact that innocent third parties, subjected to an unlawful search but not prosecuted on criminal charges, would have no occasion to invoke the exclusionary rule to suppress evidence produced by the illegal search. Reasoning from this premise, they decided that adoption of the prophylactic "subpoena first" rule was the only way to afford third parties "meaningful protection" against unlawful searches (Pet. App. 23). This conclusion is incorrect. As demonstrated above, substantial guarantees that warranted searches will be lawful are provided by the requirements of the warrant procedure itself. It is the Warrant Clause, and not the exclusionary rule, that is the principal protection of the privacy rights of innocent citizens. Furthermore, persons aggrieved by violations of their Fourth Amendment rights may in some cases initiate legal proceedings, including damage actions, to vindicate those rights and deter future misconduct. See 42 U.S.C. 1983; *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388.¹⁰ Additional legal recourse is available in an action for return of property wrongfully held by public officials. See *Warden v. Hayden*, *supra*, 387 U.S. at 307-308; Rule 41(e), Fed. R. Crim. P.

In sum, we submit that the courts below erred in concluding that whenever third parties are involved, an additional procedural requirement—demonstration of a subpoena's impracticality—is mandated by the

¹⁰ We recognize that damage actions will not always be an available remedy because of the "good faith" defense, which is especially potent in cases involving warranted searches.

Fourth Amendment's prohibition of unreasonable searches. The reasonableness of searching premises of third parties is most appropriately ensured not by a sweeping prophylactic modification of the traditional warrant procedures, but by the sensitivity of executive and judicial officers to the specific circumstances of each proposed search. This Court has recognized that, in search and seizure cases, "[t]he test of reasonableness cannot be fixed by *per se* rules; each case must be decided on its own facts." *South Dakota v. Opperman*, 428 U.S. 364, 373, quoting with approval from *Coolidge v. New Hampshire*, *supra*, 403 U.S. at 509-510 (concurring and dissenting opinion of Black, J.) The initial assessment that a warranted search is reasonable under all the circumstances should be and currently is made by executive officials in the course of their decision to apply for a warrant. That assessment is ratified by a neutral magistrate when and if he determines that a warrant should issue.

In addition, we emphasize that the magistrate remains free to impose any special restrictions on the manner of the warrant's execution that he believes are necessary to guarantee the reasonableness of the authorized search. In an appropriate case, for example, the magistrate may direct that police refrain from searching particular areas until after an informal request addressed to the owner or occupant has failed to inspire production of the materials sought. Finally, if in a given case a party whose premises have been searched believes that the lack

of a prior opportunity for voluntary cooperation rendered the subsequent search unlawful, judicial remedies are available to vindicate Fourth Amendment rights. See p. 29, *supra*. Those remedies are properly applied on a case-by-case basis after review of all the circumstances. Proliferation of procedural barriers to the issuance of warrants that fall into certain artificially created categories would prove an unwise and unworkable means of enforcing the Fourth Amendment.

C. THE FIRST AMENDMENT CONCERNS IMPLICATED IN THE SEARCH OF A NEWSPAPER OFFICE DO NOT NECESSITATE INTERPOSITION OF ADDITIONAL PROCEDURAL OBSTACLES TO THE ISSUANCE OF SEARCH WARRANTS

As is clear from the foregoing discussion, the federal government's principal concern in this case arises from the broad sweep of the decision below, which would alter the existing procedures for securing evidence by warranted search in cases involving a potentially large, albeit undefined, class of "third-parties." In the course of the opinion, however, the courts below did indicate that adherence to the "subpoena first" rule is especially important where First Amendment interests are involved (Pet. App. 14, 28), and by far the bulk of respondents' argument (Br. 11-40) on the merits of their Fourth Amendment claim is devoted to a defense of the rule promulgated by the courts below as applied in the context of a search of a newspaper office. We now turn, accordingly, to a discussion of the question whether the Fourth Amendment requires a general rule barring the issuance of a warrant

to search "press" premises in all cases in which it has not been demonstrated to the magistrate that a subpoena or restraining order would not succeed in securing production of the materials sought.

This Court has often acknowledged that the protection of First Amendment liberties is an important element of the law of search and seizure. See, e.g., *Roaden v. Kentucky*, 413 U.S. 496; *Stanford v. Texas*, 379 U.S. 476; *A Quantity of Books v. Kansas*, 378 U.S. 205; *Marcus v. Search Warrant*, 367 U.S. 717. Indeed, widespread abhorrence for general warrants authorizing indiscriminate search and seizure of private books and papers, and concern for the impact of such actions on freedom of expression, lie at the very origin of the Fourth Amendment. See *Stanford v. Texas*, *supra*, 379 U.S. at 481-485; *Entick v. Carrington*, 19 How. St. Tr. 1030, 95 Eng. Rep. 807; *Wilkes v. Wood*, 19 How. St. Tr. 1153, 98 Eng. Rep. 489; T. Taylor, *supra*, at 29-35. "The Bill of Rights was fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression." *Marcus v. Search Warrant*, *supra*, 367 U.S. at 729. Certainly one may infer from the foregoing authorities and consideration of the history of the Fourth Amendment that where a search of newspaper offices is contemplated, the readily identifiable First Amendment interests involved are entitled to thorough consideration.

In this regard, it should be noted at the outset that federal law enforcement officials rarely if ever engage

in the practice of searching newspaper offices. No case has been found in which any media facility has been searched under federal auspices. The solicitude of the federal government for legitimate press interests is reflected in Justice Department guidelines for the issuance of subpoenas to newsmen. See *Branzburg v. Hayes*, 408 U.S. 665, 706-707 and n.41. These guidelines, codified at 28 C.F.R. 50.10, provide that "[a]ll reasonable attempts should be made to obtain information from nonmedia sources before there is any consideration of subpoenaing a representative of the news media" (subsection (b)). They further provide that "[n]egotiations with the media shall be pursued in all cases in which a subpoena is contemplated" (subsection (c)) and that "no Justice Department official shall request, or make arrangements for, a subpoena to any member of the news media without the express authorization of the Attorney General" (subsection (d)).¹¹ While the guidelines are silent on the subject of obtaining warrants to search news media premises, it may reasonably be inferred from the policies relating to subpoenas that great care would similarly be exercised in the case of searches.

In light of the policy determinations underlying the guidelines and the history of relevant federal practices, it can fairly be supposed that federal law enforcement efforts would not be seriously hampered by

¹¹ Justice Department records reveal that the Attorney General authorized 23 subpoenas to members of the news media in 1976 and 17 in 1977.

a decision of this Court approving the "subpoena first" rule of the courts below in the limited context of searches of the press as a neutral "third-party" believed to be in possession of evidence bearing upon a criminal investigation.

Nevertheless, the observation that such a rule would not be damaging, or the conclusion that it is generally a good idea, does not lead inexorably to the result that the rule is constitutionally required, and we oppose the result of the courts below insofar as it is embodied in an across-the-board modification of the warrant procedure as applied to searches of the press. We submit that the course selected by the Framers, embodied in the Warrant Clause of the Fourth Amendment, depends upon the discretion of executive officers and, more important, upon the detached judgment of a neutral magistrate to guarantee in the first instance that a warranted search is reasonable under all the circumstances, including the possible impact of the proposed search on values protected by the First Amendment.

Thus, in acting upon an application for a warrant, a magistrate may and should consider a number of factors, including the nature of the items that the police intend to seize, the nature of the place that the police intend to search, the importance of the materials sought to overall law enforcement efforts, and even the necessity for proceeding by search rather than by available alternative means that may be less intrusive on interests of privacy or freedom of expression. Furthermore, the magistrate may restrict or

adjust the manner and conditions of a warranted search in order to avoid unnecessary infringement on privacy and other constitutionally protected values.

This Court has held in a First Amendment context that "[a] seizure reasonable as to one type of material in one setting may be unreasonable in a different setting or with respect to another kind of material." *Roaden v. Kentucky*, *supra*, 413 U.S. at 501. It has similarly indicated that a search warrant's description of items to be seized may be impermissibly general when the items have potential First Amendment protection even though the same description might be sufficiently particular for other items. *Stanford v. Texas*, *supra*, 379 U.S. at 486. Accordingly, where a prosecutor or police officer seeks a warrant authorizing the seizure of material involving some kind of expression, such as a photograph, and where the application further reveals that the search for that material may well affect significant First Amendment activity, such as the publication of a newspaper, the magistrate should and ordinarily will recognize that special care must be taken in assessing the reasonableness of the proposed search and seizure. At a minimum, he should satisfy himself that the search is intended to achieve bona fide law enforcement aims and is not designed to provide an opportunity for harassment.

These views are reflected in a recent statement of this Court in *Andersen v. Maryland*, *supra*, 427 U.S. at 482 n. 11:

[T]here are grave dangers inherent in executing a warrant authorizing a search and seizure

of a person's papers * * *. In searches for papers, it is certain that some innocuous documents will be examined, at least cursorily, in order to determine whether they are, in fact, among those papers authorized to be seized. * * * [R]esponsible officials, including judicial officials, must take care to assure that [such searches] are conducted in a manner that minimizes unwarranted intrusions upon privacy.

Heeding this exhortation, a magistrate may shape and structure a warranted search in a way calculated to render the search reasonable. In this connection he may, before authorizing a search, require a showing that the desired material cannot safely be sought by less intrusive means. In extreme cases, he may even conclude that although a warrant application fulfills the probable cause and particularity requirements of the Fourth Amendment, no feasible restrictions on the manner of execution of the proposed search would suffice to ensure its reasonableness. Under such circumstances, the magistrate may simply decline to issue the warrant.

We submit that these protections, comprehended within the traditional scope of a judicial officer's review of an application for authority to search, are the only ones mandated by the Constitution for safeguarding First Amendment freedoms in the warrant process. This is not to say that the political branches of government cannot or should not impose additional restrictions on searches of media premises. The executive may, by regulation, install procedures requiring

that press searches receive the advance approval of high-ranking executive officials. As a substitute or supplement, it may sharply circumscribe the occasions upon which resort to such law enforcement tactics will be permitted. Or it may choose informally to eschew searches of press offices and to rely exclusively on alternate means of acquiring information necessary for criminal investigations and prosecutions. For its part, the legislature may enact similar restrictions on press searches.¹²

¹² A recent study reports that 26 states have adopted legislation conferring upon newsmen some degree of statutory immunity from subpoenas seeking the source or substance of information acquired in the course of news gathering activities. See Note, *supra*, note 6, 28 Stan. L. Rev. at 960-967 and n. 20; see also Comment, *Newsmen's Privilege Two Years After Branzburg v. Hayes: The First Amendment in Jeopardy*, 49 Tul. L. Rev. 417, 429 and n. 100 (1975). A law of this kind is currently in effect in California. Ann. Cal. Evid. Code 1070 (West Cum. Supp. 1977).

None of the so-called "reporter's shield" laws addresses itself explicitly to the subject of searches of press offices. Nevertheless, at least one commentator has suggested that some shield statutes, and in particular the currently effective amended version of California's law, might be read to cover both subpoenas and searches. See Note, *supra*, 28 Stan. L. Rev. at 962-971. Respondents themselves have acknowledged this argument without fully embracing it. Br. 27-28 and n. 12.

The version of the California shield law in effect at the time of the district court's decision in this case insulated newsmen from adjudications of contempt based upon refusals "to disclose the source of any information procured for publication and published in a newspaper." Ann. Cal. Evid. Code 1070 (West 1966). In 1974, the statute was amended to provide identical protection for newsmen's refusals "to disclose any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public." The phrase "unpublished infor-

The government's limited contention here is that no such measures are constitutionally compelled. Adoption of the "subpoena first" rule, modified to apply only to searches of media offices, would represent a judicial endorsement of two classes of First Amendment freedoms, one designed for the majority of American society and one tailored specially for the press. Such a result would run counter to recent decisions of this Court rejecting in different contexts assertions of a newsmen's right to preferential treatment. See, e.g., *Branzburg v. Hayes*, *supra*; *Pell v. Procunier*, 417 U.S. 817; *Saxbe v. Washington Post Co.*, 417 U.S. 843.¹³

"mation" was broadly defined and would clearly cover the photographs sought in this case. Ann. Cal. Evid. Code 1079(c) (West Cum. Supp. 1977). Nonetheless, the applicability of California's shield law to searches of news facilities remains problematical. The statute guards against contempt adjudications for refusals to disclose information in any proceeding "in which, pursuant to law, testimony can be compelled to be given." Ann. Cal. Evid. Code 1070 (West Cum. Supp. 1977), 901 (West 1966). Arguably, a search is not such a proceeding. Cf. *Andresen v. Maryland*, *supra*. In any event, the permissibility of the search here at issue under present California law may be sufficiently debatable to persuade this Court that this case is not an appropriate vehicle for the announcement of an important constitutional rule.

¹³ Moreover, approval of a constitutional rule making satisfaction of extraordinary procedural requirements an obligatory prelude to the issuance of valid warrants for press searches would inevitably spawn knotty problems in determining when the subject of a proposed search is sufficiently similar or related to the mass media to invoke the special protection provided.

In their attempt to defend the rule fashioned by the courts below, respondents rely heavily on the facts of this case. They stress (Br. 12) that in this case the affidavit submitted in support of the search warrant did not allege that any staff member of the *Daily* was suspected of criminal behavior. They further observe (Br. 11-12) that the photographs sought constituted mere evidence of a crime rather than weapons, contraband, or stolen property. Moreover, probable cause to believe that the photographs existed and that they were located at the *Daily's* offices was produced not by independent police investigation but by the *Daily's* own publication of its April 11, 1971 edition, an activity plainly encompassed within First Amendment freedoms. Finally, the evidence sought was itself communicative material deserving First Amendment protection.

On the basis of these facts, respondents maintain that rejection of the decision below will produce a host of consequences detrimental to press activities. Valuable sources of information who wish to preserve their anonymity or the confidentiality of their communications may refuse to deal with newsmen. Newsmen themselves will hesitate to record and save their recollections of conversations and events, for fear that later police searches will result in breaches of confidence. Vigorous participation in the editorial process may be chilled by the threat that subsequent searches will reveal unpopular positions. It is also suggested

that news media may censor their own publications or programs in an effort to avoid creating the impression that they possess materials of interest to law enforcement officials. Last but not least, a search itself may so thoroughly disrupt ordinary media activity that a particular edition or broadcast is delayed, damaged, or eliminated altogether.

As Justice White has accurately explained in his opinion for the Court in *Branzburg v. Hayes*, *supra*, 408 U.S. at 693-695, the empirical likelihood of any or all of these occurrences is extremely difficult to predict. In any event, the probability and severity of possible negative effects on press interests will undoubtedly vary substantially from case-to-case, as will the factual settings in which search warrant applications are presented to magistrates. This observation suggests that the *per se* rule fashioned by the courts below is poorly suited to ensuring that First Amendment freedoms and legitimate law enforcement needs are properly accommodated.¹⁴

¹⁴ The courts below did not comment upon the possible interaction between state shield statutes and the "subpoena first" rule. Assuming that the impracticality of a subpoena must be established before a valid search warrant may issue, a serious question arises concerning the impact of an applicable shield law on a magistrate's impracticality determination. It could be argued that the mere existence of such a law should suffice to convince a magistrate that a subpoena would be impractical, since no contempt sanction could be imposed on a newsman choosing to disobey a judicial demand for production of certain materials. A less extreme position might be that the existence of an applicable shield statute combined with one or more prior refusals by a particular media representative to deliver information in response to a subpoena

The argument that the Fourth Amendment comprehends protection of First Amendment interests within the case-by-case magisterial evaluation implicit in the Warrant Clause is fully consistent with earlier decisions of this Court concerning searches and seizures that potentially impinge on First Amendment freedoms. For example, in *Stanford v. Texas*, *supra*, this Court relied upon the particularity requirement of the Warrant Clause to invalidate a seizure of some 2,000 books belonging to the petitioner, Mr. Justice Stewart's opinion for the Court clearly demonstrated that the assurances included in the Warrant Clause are sufficiently flexible to take account of First Amendment values.

[T]he constitutional requirement that warrants must particularly describe the "things to be seized" is to be accorded the most scrupulous exactitude when the "things" are books, and the basis for their seizure is the ideas which they contain. * * * We need not decide in the present case whether the description of the things to

should be enough to establish the impracticality of further subpoenas to the same party. A third conceivable stance would be that, in the absence of any indication that evidence will be destroyed, a subpoena should be served before a search is authorized, even where the magistrate has every reason to believe that the newsman subpoenaed will rely on the shield law to protect his noncompliance. Interpretation and application of the various state shield statutes are, of course, exclusively matters of state concern, and the federal government accordingly expresses no views on the subject. The issue raised in this footnote does, however, illustrate one set of problems likely to be created by adoption of the "subpoena first" rule in the press context.

be seized would have been too generalized to pass constitutional muster, had the things been weapons, narcotics or * * * [other] contraband of that kind * * *.

379 U.S. at 485-486; footnotes omitted. In *Heller v. New York*, 413 U.S. 483, this Court sustained the warranted seizure of an allegedly obscene film, even though the warrant had been issued in the usual *ex parte* manner and no prior adversary hearing had been conducted on the character of the film. The Court again emphasized that the necessity for a prior judicial determination of probable cause provides meaningful safeguards even in the First Amendment area. *Id.* at 492-493.¹⁵ Other decisions are not to the contrary. As the Court noted in *Heller, supra*, 413 U.S. at 491; footnote omitted, both a *Quantity of Books v. Kansas, supra*, and *Marcus v. Search Warrant, supra*, involved "the seizure of large quantities of books for the sole purpose of their destruction * * *." The official action in those cases plainly obstructed the circulation of material arguably entitled to First Amendment protection, thereby invoking the need for a prior adversary hearing. By contrast, in *Heller* and the present case, no limitation was imposed on dissemination.

* * * * *

¹⁵ This case, like *Heller*, involves no prior restraint on expression. Neither case presents a situation in which police officers have seized or attempted to seize a party's only copy of a film or photograph, thus preventing further exhibition or publication. To guard against such an eventuality, the Court in *Heller* directed that "prompt copying of seized material should be permitted. If copying is denied, return of the seized material should be required." 413 U.S. at 493 n. 11.

The district court decided this case on respondent's motion for summary judgment. We have argued that the declaratory relief granted to respondents was awarded on the basis of an erroneous legal theory. Under the approach outlined in this brief, the courts below might still find that the search of the *Daily's* offices, though authorized by warrant, was unreasonable, either because the warrant did not contain necessary restrictions on the manner of its execution or because under the circumstances no search should have been permitted at all. The primarily factual nature of such a determination—and the present controversy among the parties regarding the factual inferences to be drawn from the record as it now stands—suggest that summary judgment is an inappropriate procedure for resolution of the underlying dispute in this case.¹⁶ We therefore recommend that the judgment be reversed and the case remanded to the court of appeals for whatever further proceedings that court may deem fitting in light of this Court's opinion. The court of appeals should be invited to consider whether, in view of the revised posture of the case, any constitutional barriers prevent the award of declaratory relief. See *Ashcroft v. Mattis*, 431 U.S. 171. Likewise, the court of appeals should be asked to examine whether, even in the absence of constitutional obstacles, a federal court should exercise its statutory discretion to grant

¹⁶ The precise details of the search itself, for example, could be highly relevant to the result, irrespective of the inclusion *vel non* of salutary conditions in the warrant.

a declaratory judgment announcing the unreasonableness of an individual search. See 28 U.S.C. 2201.

II. ASSUMING RESPONDENTS WERE ENTITLED TO PREVAIL ON THE MERITS, THE AWARD OF ATTORNEY'S FEES WAS PROPER

A. THE CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT AUTHORIZED THE AWARD OF FEES FOR SERVICES PERFORMED BEFORE THE ACT BECAME LAW

If this Court should affirm the decision below on the merits, the award of attorney's fees should also be affirmed.

The district court awarded attorney's fees to the respondents here because (Pet. App. 50; footnote omitted):

[F]ee shifting is necessary to insure the vindication of important constitutional rights and appropriate because of the inadequate remedies otherwise available, because it is consistent with a remedy increasingly furnished by Congress, and because of the high social value placed upon the rights involved, an award of attorney's fees at costs is essential, lest these important rights be relegated to a mere platitude.

Although the court's award was consistent with the decisions of many federal courts awarding attorney's fees to plaintiffs on similar "private attorney general" rationales,¹⁷ this Court subsequently found such awards

¹⁷ See, e.g., *Souza v. Travisono*, 512 F. 2d 1137 (C.A. 1), vacated and remanded, 423 U.S. 809, *Cornist v. Richland Parish School Board*, 495 F. 2d 189 (C.A. 5); *Taylor v. Perini*, 503 F. 2d 899 (C.A. 6), vacated and remanded, 421 U.S. 982; *Donahue v. Staunton*, 471 F. 2d 475 (C.A. 7), certiorari denied, 410 U.S. 955; *Fowler v. Schwarzwald*, 498 F. 2d 143 (C.A. 8); *Brandenburger v. Thompson*, 494 F. 2d 885 (C.A. 9).

improper in *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240. In that case, this Court held that exceptions to the general American rule that litigants pay their own attorney's fees are for Congress to enact," and while Congress had enacted several provisions in selected statutes permitting a federal court to award fees to a successful litigant, it had not "extended any roving authority to the Judiciary to allow counsel fees as costs or otherwise whenever the courts might deem them warranted." 421 U.S. at 260.

While this case was still pending in the court of appeals, Congress enacted the Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. 94-559, 90 Stat. 2641, 42 U.S.C. (1976 ed.) 1988. That Act provides: "In any action * * * to enforce a provision of section * * * 1979 * * * of the Revised Statutes [42 U.S.C. 1983] * * * the court, in its discretion, may allow the prevailing party * * * reasonable attorney's fees as part of the costs." It was specifically designed to "remedy anomalous gaps in our civil rights laws created by the United States Supreme Court's recent decision in *Alyeska Pipeline Service Co. v. Wilderness Society*," S. Rep. No. 94-1011, 94th Cong., 2d Sess. 1 (1976).

The court of appeals correctly held that the passage of the Act "revalidated" the district court's award of attorney's fees (Pet. App. 6). This conclusion is amply

¹⁸ The court in *Alyeska* specifically approved (421 U.S. at 259) the "inherent power in the courts to allow attorney's fees in particular situations"—including when the losing party has acted in bad faith.

supported by the legislative history of the Act and by the decisions of this Court.

In *Bradley v. Richmond School Board*, 416 U.S. 696, this Court affirmed an award of attorney's fees for services performed before the statute authorizing the award was enacted. Although the legislative history of 20 U.S.C. (Supp. V) 1617, the statute involved in *Bradley*, was ambiguous concerning whether it was to be applied to pending cases (416 U.S. at 716 n. 22), the Court applied the general rule followed when there is a change of law while a case is pending on appeal: it applied the law in effect at the time of decision, in the absence of clear indication of a contrary legislative intent or a showing that manifest injustice would result from application of the new law. 416 U.S. at 711; *Thorpe v. Housing Authority of the City of Durham*, 393 U.S. 268; *United States v. The Schooner Peggy*, 1 Cranch 102.

In contrast to the legislative history of the statute involved in *Bradley*, the legislative history here is clear. In passing the Civil Rights Attorney's Fees Awards Act, Congress repeatedly indicated its intent that the courts were to have authority to award attorney's fees in pending cases, as well as those instituted after enactment of the Act. The House specifically rejected an amendment making the Act applicable only to cases filed after the effective date of the Act (122 Cong. Rec. H12160 (daily ed., October 1, 1976)). The committee reports both expressly state that the bill permits awards in pending cases, referring to *Bradley* as authority. S. Rep. No. 94-1011, 94th

Cong., 2d Sess. 5 (1976); H.R. Rep. 94-1558, 94th Cong., 2d Sess. 4 n. 6 (1976). Moreover, during the floor debate, members of Congress consistently stated that the Act would apply to cases pending at the time of enactment, and cited *Bradley* as support for that point. See, 122 Cong. Rec. H.12160 (daily ed., October 1, 1976) (remarks of Rep. Drinan, floor leader of the legislation in the House); 122 Cong. Rec. S.17052 (daily ed., September 29, 1976) (remarks of Sen. Abourezk). See also, 122 Cong. Rec. H.12155 (daily ed., October 1, 1976) (remarks of Rep. Anderson).¹⁹

In light of this compelling legislative history, the court of appeals did not consider whether interpreting the statute to apply as Congress intended would

¹⁹ The suggestion of petitioners in No. 76-1484 (Br. 41-42) that an award of attorney's fees in pending cases may not cover services performed before the passage of the Act is flatly inconsistent with *Bradley*, in which this Court focused on the propriety of "the application of the statute to an award of fees for services rendered prior to its effective date" (416 U.S. at 721), and specifically held that the district court was authorized to allow reasonable attorney's fees from a date preceding the enactment of the statute (*id.* at 724). Nothing in the legislative history of the 1976 Attorney's Fees Awards Act suggests that Congress intended the limitation petitioners suggest. Instead, both the extensive reliance on *Bradley* and the congressional intent to undo the effects of the *Alyeska* decision, *supra* at 45, strongly indicate that Congress intended to authorize fee awards for all services performed in pending cases. The courts of appeals agree. See *Rainey v. Jackson State College*, 551 F. 2d 672 (C.A. 5); *Martinez Rodriguez v. Jiminez*, 551 F. 2d 877 (C.A. 1); *Bond v. Stanton*, 555 F. 2d 172 (C.A. 7); *Finney v. Hutto*, 548 F. 2d 740 (C.A. 8), certiorari granted, October 17, 1977, No. 76-1660.

result in manifest injustice. Nor do we think that *Bradley* suggests that such an inquiry is required in these circumstances.²⁰

In any event, here, as in *Bradley*, an award of attorney's fees for services performed before the Act became effective works no injustice. In concluding that the retroactive award in *Bradley* worked no injustice, the court considered "(a) the nature and identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in law upon those rights." 416 U.S. at 717. The Court's analysis in *Bradley* supports the award of fees here.

(a) In *Bradley*, the Court noted a disparity in the ability of the publicly funded school board and the plaintiff school children to protect their rights, and noted that the suit rendered the Board a substantial service by bringing it into conformity with the Constitution. Similarly, here the respondent is a university newspaper, while the petitioners, although named individually, are defended by their employers, the City of Palo Alto and the County of Santa Clara, and these entities will be responsible for any judgments against them (Ann. Cal. Gov. Code 825 (West.

²⁰ The question considered in *Bradley*, and here resolved by Congress, is whether the fact of retroactivity itself makes the award unjust. Of course, the district court must always consider whether shifting the costs of litigation in the particular case is just, as it did here (Pet. App. 43-53); petitioners are incorrect in suggesting that the award of attorney's fees is the inevitable result of a civil rights complaint (Bergna Br. 27).

²¹ See also Cal. Gov. Code 995 *et seq.* and *Williams v. Horvath*, 16 Cal. 3d 834, 548 P. 2d 1125, in which the California Supreme Court cites the district court opinion in this case as support for a

Cum. Supp. 1977)).²¹ And, as in *Bradley*, this action if affirmed on the merits, will have accomplished a substantial public service to the law enforcement community by bringing its actions into compliance with constitutional standard.

(b) In *Bradley*, the enactment of the statute permitting the award of attorney's fees did not affect any previously unconditional right of the School Board to determine the use of the funds the court required to be used to pay attorney's fees. The situation here is precisely similar. In both cases, "[t]hese funds were essentially held in trust for the public, and at all times the Board [or, here, the City and County] was subject to such conditions or instructions on the use of the funds as the public wished to make through its duly elected representatives." 416 U.S. at 720. Cf. *Greene v. United States*, 376 U.S. 149.

(c) Finally, the change in the law relating to the award of attorney's fees had no impact, either here or in *Bradley*, on the substantive law on the basis of which the case was decided—there, the application of

holding that Section 825 applies to cases brought against state employees under 42 U.S.C. 1983. Petitioners' briefs do not dispute the district court's assertion (Pet. App. 52-53) that the public employers will pay any judgment for attorney's fees entered in this case. See Bergna Br. 32, and Zurcher Br. 40 and n. 23. Although the Zurcher brief states that holding the officers responsible for the award of fees would "punish them," that brief was filed by the City Attorney for the City of Palo Alto, employer of the defendant officers (see A. 16, 45), indicating that the City is defending the officers pursuant to Section 825 and will also, under that statute, be responsible for any award of fees against these petitioners.

the Constitution to school desegregation, and here, the responsibilities of law enforcement personnel under the Fourth Amendment. Moreover, when this case was filed and litigated in the district court and until the *Alyeska* decision, an award of attorney's fees was itself possible under the "private attorney general" theory. See *La Raza Unida v. Volpe*, 57 F.R.D. 94 (N.D. Calif.). Thus, as in *Bradley*, there is no indication that, if petitioners had known of their potential liability under the 1976 Act, this knowledge "would have caused [them] to order [their] conduct so as to render this litigation unnecessary and thereby preclude the incurring of such costs." 416 U.S. at 721.²²

Petitioners argue (Zurcher Br. 43-45) that retroactive application of the Civil Rights Attorney's Fees Award Act is manifestly unjust in cases challenging actions taken in good faith in conformity with then-existing legal standards. But the defendants' good faith—either in taking the action alleged to violate the Constitution or in defending the suit—is not a proper basis for precluding application of the Act, either prospectively or retroactively. As this Court recognized in *Alyeska Supra*, 421 U.S. at 258-259, it has long been the rule that attorney's fees may be awarded against a party who has acted in bad faith, and *Alyeska* did not alter that rule. Accordingly, there would have been no purpose in enacting the Attorney's

²² The California law under which the public employers of the petitioners provide representation and indemnification has been in effect since 1963.

Fees Awards Act if it were to apply only where the losing party had acted in bad faith.²³ Moreover, whether the Act is applied prospectively or retroactively, officials acting in good faith pursuant to valid laws and defending suits arising therefrom would scarcely be influenced by the possibility that their actions may eventually result in the award of attorney's fees against the public entities they represent. Awards of fees are appropriate under the Act when litigation vindicates public policy inherent in constitutional principles. It was therefore proper for the district court, after finding that this action had done so, to exercise its discretionary authority to award attorney's fees.

B. THE AWARD OF FEES HERE VIOLATES NO IMMUNITY FROM SUIT OF THE PETITIONERS

Petitioners in No. 76-1600 contend (Bergna Br. 26-35) that requiring them to pay respondents' attorney's

²³ A holding that attorney's fees should ordinarily not be awarded unless the actions of the party to be charged were in clear violation of constitutional or statutory principles would be inconsistent with the statutory purpose—which is to encourage plaintiffs to seek to vindicate constitutional principles, not merely to deter egregious and obvious violations. In *Johnson v. Georgia Highway Express, Inc.*, 488 F. 2d 714, 718 (C.A. 5), the Fifth Circuit stated that attorney's fees in cases presenting novel issues should appropriately compensate the attorney "for accepting the challenge." Congress, in passing the Attorney's Fees Awards Act, cited *Johnson* as correctly explaining standards governing awards of fees. See S. Rep. No. 94-1011, *supra*, at 6; H.R. Rep. No. 94-1558, *supra*, at 8. 122 Cong. Rec. H12160 (daily ed., October 1, 1976) (remarks of Rep. Drinan); 122 Cong. Rec. S16491 (daily ed., September 23, 1976) (remarks of Sen. Tunney).

fees is inconsistent with their immunity, as judicial and prosecuting officials, from suits for damages. The common law official immunity upon which petitioners rely is subject to limitation by statute, *Wood v. Strickland*, 420 U.S. 308, 316; *Imbler v. Pachtman*, 424 U.S. 409, 434 (White, J., concurring). Thus, the enactment of the Attorney's Fees Awards Act removed whatever immunity to the award of attorney's fees petitioners might have enjoyed in the absence of the Act.

The Act specifically authorizes an award of attorney's fees to "the prevailing party" in "any action" brought under 42 U.S.C. 1983, as was this one. Although Congress did not provide for the naming of municipalities as defendants in cases brought under 42 U.S.C. 1983 (*Monroe v. Pape*, 365 U.S. 167), state and local officials clearly are subject to that act as "persons" acting "under color of" state laws. As Congress noted in enacting the Attorney's Fees Awards Act (S. Rep. No. 94-1011, *supra*, at 5; footnote omitted):

[D]efendants in these cases are often State or local bodies or State or local officials. In such cases it is intended that the attorneys' fees, like other items of costs, will be collected either directly from the official, in his official capacity, from funds of his agency or under his control, or from the State or local government (whether or not the agency or government is a named party).

The House Report is to the same effect (H.R. Rep. No. 94-1558, *supra*, at 7).²⁴

In light of this legislative history, it would be inappropriate to construe the broad language of the Civil Rights Attorney's Fees Awards Act as incorporating an exception comparable to the common law immunity of certain officials from suits for damages that this Court has held to be preserved in 42 U.S.C. 1983 (see *Tenney v. Brandhove*, 341 U.S. 367; *Imbler v. Pachtman*, *supra*). That common law immunity, which protects the covered official only from personal suits for damages (see *Imbler v. Pachtman*, *supra*, 424 U.S. at 428-429), is entirely compatible with a statutory award of attorney's fees when equitable relief has been secured against such an official. Like an award of

²⁴ Contrary to petitioners' suggestion (Bergna Br. 31-32), it is not necessary that municipalities be subject to suit in order to impose on those entities the obligation to pay opposing attorney's fees.

There is no requirement that a governmental entity must be a named defendant for the court to issue an order requiring the expenditure of the funds of that entity. Indeed, in *Fitzpatrick v. Bitzer*, 427 U.S. 445, 449 n. 4, this Court approved an award of backpay and attorney's fees to be paid from state funds, although neither the state nor any state agency was a named defendant. Since the public entity confers upon its officers the authority to act on its behalf, it is entirely appropriate to require the entity to pay attorney's fees in civil rights suits challenging those actions, regardless of whether the entity has been named as a defendant.

In any event, although the district court noted, and petitioners evidently agree (see *supra*, note 21) that the governmental entities employing petitioners would pay any fees awarded here, they are not subject to any court order to do so, and thus this case does not raise the question of a federal court's jurisdiction to enter such an order. That question is raised in *Hutto v. Finney*, No. 76-1660, certiorari granted, October 17, 1977, and will be discussed in the government's brief *amicus curiae* in that case.

court costs, the award is intended neither to compensate victims nor to punish the official for past, illegal acts. Nor is the possibility of such an award, to be paid with public funds,²⁵ likely to deter public officials in the conscientious performance of their duties.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for further proceedings. If, however, the judgment on the merits is affirmed, the award of attorney's fees should also be affirmed.

Respectfully submitted.

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JANUARY 1978.

²⁵ The committee reports referred to in the preceding paragraph obviously contemplate that awards under the Act will be paid with public funds. In the unlikely event that a court were to award attorney's fees without specifying that they were to be paid from public funds, and the employing governmental entity refused to pay them, the court might well reconsider the award against the official, or direct his employer to pay it. Although not all states specifically provide by statute for the indemnification of public employees, they evidently all do provide for legal assistance (*Brief amicus curiae of Alabama, et al., App. A*).

JAN 16 1978

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1977

Nos. 76-1484, 76-1600

JAMES ZURCHER, et al.,
Petitioners,

vs.

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Respondents.

LOUIS P. BERGNA, et al.,
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Respondents' Reply to the Brief of the United States as Amicus Curiae

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INTRODUCTION

Though the Government's brief on the merits¹ differs with Respondents on matters of constitutional analysis, it squints in the same direction: searches, whether or not pursuant to warrant, must ultimately be judged by a standard of reasonableness, which is a

1. The United States agrees that the award of fees was proper (*see* Brief for the United States as *Amicus Curiae* (hereafter "U.S. Brief") at 44-54. As its conclusion and reasoning concur with ours, we do not comment further.

function of the facts and circumstances and which is more rigorous when First Amendment interests are concerned. This search, the Government agrees, is not exempt from judicial review for reasonableness and may well be unreasonable.

The United States, like each set of Petitioners and each of their supporting *amici*, is principally concerned with the consequences for law enforcement of a *per se* rule which prohibits *all* searches of "third parties" absent a showing of impracticality, which it fears will require an additional showing, in *every* warrant application, of probable cause to believe that the party to be searched has committed a crime. While we do not concur in the Government's catalogue of practical or conceptual difficulties with the District Court's view of the police power to search non-suspects, we have not thought the issues presented by *this* case on *this* record to be nearly so broad. Thus, although we believe the courts below took the correct view of the matter, our submission in this Court is, as we frankly acknowledged, somewhat narrower.

Accordingly, as we shall show, our differences with the Government's view of this case lie almost entirely beyond the issues which, as we have conceived and tendered them, are appropriately and necessarily presented in the posture of this case. Such differences as are germane to those issues relate, as we view them, to an argument for a revised *opinion* rather than for a different *judgment*.

I.

SEARCHES OF NEWSPAPER OFFICES

As noted, the Government's concern is for the practical implications of a *per se* prohibition against searches of non-press third parties. Recognizing that this case involves a search directed against a newspaper, the United States acknowledges that "protection of First Amendment liberties is an important element of the law of search and seizure" (*id.*, at 32) and that "where a search of newspaper offices is contemplated, the readily identifiable

First Amendment interests involved are entitled to thorough consideration." *Id.* Different and more exacting standards apply when First Amendment interests are involved as well as Fourth Amendment privacy interests. *Id.* Thus "a magistrate "may and should consider a number of factors" before authorizing a search, not the least of which is "the necessity for proceeding by search rather than by available alternative means that may be less intrusive on interests of privacy or freedom of expression." *Id.*, at 34. A magistrate "may, before authorizing a search, require a showing that the desired material cannot safely be sought by less intrusive means." *Id.*, at 36. And in some cases—perhaps this one—a reviewing court may "find that the search of [a newspaper's] offices, though authorized by warrant, was unreasonable, *either because the warrant did not contain the necessary restrictions on the manner of its execution or because under the circumstances no search should have been permitted at all.*" *Id.*, at 43 (emphasis added).²

2. It is odd that, having said this much, the Government refrains from endorsing the analysis in Part I of our brief. Apart from differences as to the applicability of prior cases which we had thought pertinent, the core of the Government's disagreement appears to be a concern that

"adoption of the 'subpoena first' rule, modified to apply only to searches of media offices, would represent a judicial endorsement of two classes of First Amendment freedoms, one designed for the majority of American society and one tailored specially for the press." *Id.*, at 38.

This concern is unfounded. Indeed, it is flatly inconsistent with the earlier discussion, referred to above, in which the Government concedes (*see* U.S. Brief, at 32-34) that more exacting procedural standards apply when First Amendment interests are affected. *See, e.g.,* Respondents' Brief, at 14-15 and cases cited.

Reference to cases such as *Pell v. Procunier*, 417 U.S. 817 (1974) and *Saxbe v. Washington Post*, 417 U.S. 843 (1974) confuse cases involving matters of *procedure*—in which the presence of First Amendment interests historically merits greater care—with cases in which a special *substantive* benefit or exemption is claimed in the name of the First Amendment. Cases in the latter category unquestionably have tended to reject the claimed exemption or benefit. Thus the press must comply with labor laws, antitrust laws, nondiscriminatory tax laws, and the like, and enjoys

Of greatest significance is the total absence of any contention that the decision below, as applied to searches of newspaper offices, would infringe legitimate law enforcement interests. Not a single word of the Government's brief supports any of the concerns posed by petitioners—concerns which, without refutation, we have shown to be chimerical. *See* Resp. Brief, at 32-37. Indeed, the Government's concession is made explicit, with the candor appropriate and fitting for a brief submitted by the United States as *amicus curiae*:

"In light of the policy determinations underlying the guidelines and the history of relevant federal practices, it can fairly be supposed that *federal law enforcement efforts would not be seriously hampered by a decision of this Court approving the 'subpoena first' rule of the courts below in the limited context of searches of the press as a neutral 'third party' believed to be in possession of evidence bearing upon a criminal investigation.*" *Id.*, at 33-34 (emphasis added).

No party, no commentator, and no *amicus* has offered a convincing suggestion to the contrary. Except in rare cases where a

no broad constitutional privilege against testifying pursuant to a valid subpoena. *See Branzberg v. Hayes*, 408 U.S. 665, 683-84 (1972). But cases involving questions of procedure which affect First Amendment rights—in contrast to substantive questions—unhesitatingly have treated the press and others engaged in First Amendment activities as inherently different and have insisted upon compliance with more exacting procedures than those applicable to the public generally. *See, e.g., Speiser v. Randall*, 357 U.S. 513 (1958); *Smith v. California*, 361 U.S. 147 (1959); *Marcus v. Search Warrant*, 367 U.S. 717 (1961); *A Quantity of Books v. Kansas*, 378 U.S. 205 (1964); *Freedman v. Maryland*, 380 U.S. 51 (1965); *Carroll v. Commissioners of Princess Anne*, 393 U.S. 175 (1968); *Blount v. Rizzi*, 400 U.S. 410 (1971); *Heller v. New York*, 413 U.S. 483 (1973); *Roaden v. Kentucky*, 413 U.S. 496 (1973).

These cases simply foreclose the suggestion that, when it comes to ascertaining the appropriate procedures by which the laws of government will touch some of its citizens, newspapers must be treated no differently than anybody else. Indeed, the United States has embodied this traditional view into its own practices with respect to subpoenas by imposing substantial fetters on the power of United States Attorneys to issue subpoenas directed at the press which are not applicable to subpoenas of other citizens. *See* 28 C.F.R. § 50.10 (1976), discussed in U.S. Brief, at 33.

subpoena would genuinely be impractical,³ there is no justification for a procedure which works a serious injury upon the public press for no tangible benefit. Though the cost to the free flow of ideas may not be capable of precise measurement, no fair-minded person could say—and certainly the United States does not say (*see* U.S. Brief, at 40-41)—that the allowance of newspaper office searches will not do substantial damage to First Amendment interests. With no countervailing interest to tip the scale, the practice is properly condemned.

II.

SEARCHES OF NON-PRESS THIRD PARTIES

Although we do regard the District Court's opinion as correct, the defense of its judgment does not compel us to defend the broadest application of its opinion to facts not conceivably presented on this record. The thrust of the Government's brief is an argument for a revised opinion. We shall confine our response to a defense of the position we have taken in this Court on the merits. An examination of that position will reveal that the Government has little quarrel with our view of this case.

We have earlier summarized our submission as follows:

"... The search for evidence in this case was unreasonable, and therefore condemned by the Fourth Amendment, because

3. The Government suggests (U.S. Brief, at 40 n. 14) that the existence of a state shield law might be thought to render a subpoena "impractical," at least where actually invoked to resist production. We strongly disagree.

A search of a press office may, of course, be conducted where the magistrate finds that a subpoena would be impractical. Such a showing, as the courts below made clear, is made where there is an unavoidable risk of destruction; certainly, there could be other situations of impracticality as well. But it cannot be the law that the State may unilaterally disable itself from proceeding by the less burdensome and constitutionally preferred means of subpoena, and thereafter claim that subpoenas are "impractical" because state law empowers the recipient to resist. Such a rule would produce the anomalous result that a State without a shield law designed to protect the confidentiality of press files could obviously not search a newspaper office but a State with such a law would be free to do so.

it was directed at a party not suspected of crime, and the evidence presented to the magistrate affirmatively showed that (1) the third party to be searched occupied no relationship to any criminal suspect such as would suggest a risk that the evidence might be destroyed; (2) there was no likelihood of destruction arising from the third party's status, demonstrated behavior, or the circumstances by which the evidence sought came to be in its possession; (3) lawful grounds might have existed to resist compelled production of the evidence sought; (4) particularly sensitive privacy interests of the third party (and of others whose confidences were likely to be reflected in documents in its possession) were invaded by a peculiarly intrusive form of search; and (5) there was otherwise no apparent reason shown why a subpoena would be impractical." Resp. Br., at 41.

Admittedly, that is a narrower stance than the broadest reading of the District Court's opinion. No apology is necessary. Four years of reflection, aided by several law review commentaries and the briefs of opposing counsel and *amici*, have revealed questions which a *per se* prohibition of third party searches would pose—questions not appropriately answered upon a record which simply does not present them. It is, moreover, difficult to find bright-line rules in Fourth Amendment jurisprudence. Cf. *Chambers v. Mississippi*, 410 U.S. 284 (1973); *Barker v. Wingo*, 407 U.S. 514, 521-30 (1972). Ultimately, "[t]he test of reasonableness cannot be fixed by *per se* rules; each case must be decided on its own facts." *South Dakota v. Opperman*, 428 U.S. 364, 373 (1976) quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 509-10 (Black, J., dissenting). See Resp. Br., at 41-42.

For those reasons, our submission is simply that, for the reasons summarized in the passage just quoted, the search of the *Daily* was unreasonable. The five factors meet, we submit, every objection and concern advanced by Petitioners, their *amici*, and the United States (see U.S. Brief, at 21-32) against the broader formulation of the District Court:

(1) The Government contends that there may be a problem in classifying persons as suspects or nonsuspects, and suggests that it might be held that a nonsuspect is anyone "as to whom there is no probable cause to believe he or she is criminally implicated." *Id.* at 23. The solution, the Government suggests, is "that the third party concept be strictly limited to persons or organizations indisputably free of any culpable connection with the offense or relationship to possible offenders." *Id.* at 23. Respondents' formulation unquestionably does just that. See Resp. Brief at 48-49. Where the evidence submitted to the magistrate shows that the third party is unrelated to any suspect, has a relationship to the offense and offender of distance and non-involvement (such as a doctor, a bank, a credit bureau, or a newspaper), and has no reputation suggesting a want of integrity or disinclination to comply with law, this standard is surely met.

(2) The same is true of the expressed concern that

"the use of subpoenas that the courts below would require might well result in premature notice to a guilty individual. Police may wish to inspect the premises or property of so-called third parties, not themselves suspected of any complicity in the unlawful conduct under investigation, but known to be related to, or friendly with, the likely perpetrator." U.S. Brief, at 23-24.

Again, a showing that the third party is indisputably disinterested and law-abiding provides satisfactory assurance.

(3) It is said that the police may desire to search areas "to which a criminal suspect has . . . ready access" (*id.*, at 24)—presumably a problem because, following service of a subpoena, the suspect may enter and destroy the evidence. In such a case, if no practicable means to safeguard the evidence in the interim is available, a subpoena would be impractical and, under the District Court's opinion as well as our submission, the premises could be searched.

(4) A fourth fear is for the situation in which "the probable reaction of such third parties to a subpoena . . . is unknown and unknowable" *Id.* Here, a showing that there is "no likelihood of destruction arising from the third party's status, demonstrated behavior, or the circumstances by which the evidence sought came to be in its possession" (Resp. Brief, at 41) provides the answer. Cases where the answer is truly "unknown and unknowable" may be saved for another day, on a record where that uncertainty in fact exists.

(5) The Government says that the District Court's rule, broadly read, will require a showing on each search warrant application that the person to be searched is a suspect. That requirement in no way follows from our view of the case, for we have said only that a search becomes unreasonable where the evidence actually presented to the magistrate affirmatively shows that the third party is not suspected of crime. *See* Resp. Brief, at 41.

(6) The Government suggests that the opportunity afforded by a subpoena—admittedly "valuable in cases where the subpoenaed party can make a convincing showing that he does not possess the requested materials or that they are subject to some overriding privilege" (U.S. Brief, at 27)—may delay a criminal investigation. The importance of this right is extensively demonstrated in Respondents' Brief, at 25-31, 45-48. The danger of delay occasioned by a pending motion to quash cannot be substantial; courts are not powerless to summarily deny an ill-founded motion, and there surely can be no virtue in a process which overcomes a well-taken claim of privilege by acting peremptorily before that claim can be judicially determined.

Consideration of these several expressed concerns demonstrates that in this case, there was no reason to proceed by search warrant and sound reason to declare it unreasonable. The Government strikingly refrains from defending either the search in this

case or contesting Respondents' statement of principles by which it ought to be condemned. Arguing only against a *per se* rule which defense of the judgment below does not compel us to support, the Government candidly concedes a great deal:

"We do not mean by the foregoing to suggest that law enforcement authorities should be in any way discouraged from using subpoenas where feasible, or that there are no valuable interests that are served when a subpoena is used rather than a search, or even that there may not be occasions on which it would be appropriate to refuse issuance of a search warrant because it is unreasonable to proceed by those means rather than by subpoena or even a request for voluntary cooperation. One undeniable benefit of a subpoena, whenever prompt compliance is forthcoming, is that it avoids the necessity for police rummaging that may disclose private materials not subject to inspection or seizure under the terms of the warrant. (In many cases a police request for voluntary production at the time the warrant is served could accomplish the same objective, but that will not always be so; here, for example, it appears that the photographs might not have been producible because they did not exist at the time of the search.)

Another cited benefit of the use of the subpoena is that it affords the third party an opportunity to litigate his obligation to supply the requested materials. We recognize that this may be valuable in cases where the subpoenaed party can make a convincing showing that he does not possess the requested materials or that they are subject to some overriding privileges, such as the attorney-client privilege, that shields them from production even though they may contain evidence of a crime." *Id.*, at 26-27.

Against these conceded interests, the Government has arrayed no objections, other than those which we have shown to be inapplicable to the formulation which we submit governs this case. Indeed, the Government forthrightly concedes that a rule

forbidding unreasonable third-party searches poses little threat to law enforcement:

"It is, moreover, in the nature of things that unnecessary or unjustifiable searches of truly disinterested third parties are rare. We canvassed a number of federal prosecutors' offices in connection with the preparation of this brief and were consistently told that there is a strong preference for proceeding by subpoena or, better yet, by informal request rather than by search whenever it appears feasible to do so (which is almost always in the case of indisputably disinterested third parties such as banks or telephone companies). This preference [sic] is predictable and understandable in light of the fact that the warrant mechanism is relatively cumbersome and demanding and that searches perceived as unnecessary by the citizenry can be destructive of police-community relations—considerations that make law enforcement officials unlikely to seek a warrant in the first instance unless they have some reason to fear that less drastic measures will prove inadequate." *Id.*, at 22.

III.

NECESSITY OF A REMAND

The United States agrees that under its approach, the *Daily* search might well have been unreasonable "either because the warrant did not contain necessary restrictions on the manner of its execution or because under the circumstances no search should have been permitted at all." *Id.*, at 43.

If this Court thinks that the question of reasonableness cannot be determined on this record without a further hearing, we would not oppose a remand. But, for several reasons, it does not seem to us that additional proceedings are necessary.⁴

4. We do not understand the Government's suggestion that, on remand, the Court of Appeals might consider whether, under *Ashcraft v. Mattis*, U.S., 52 L.Ed2d 219 (1977), there are constitutional barriers to the entry of declaratory relief to be an independent reason for a remand. This issue is not before the Court. In any event, there is not the

First, although the Government suggests that "the primarily factual nature of such a determination" (*id.*) makes that course appropriate, it does not suggest what that inquiry ought to be. There is a reference to determining the "precise details of the search itself" (*id.*, at n. 16), but that would be irrelevant to a determination of either whether the magistrate should have imposed "necessary restrictions" or whether any "search should have been permitted at all." The minor factual quibbles between the parties—such as whether the search lasted 15 minutes or 45—are inconsequential.

Second, the essential facts are genuinely undisputed. Compare Bergna Brief at 9-10 and Zurcher Brief at 10 with Resp. Brief, at 2-3. The details of the search are painstakingly set out in affidavits submitted by both sides which, at least as to the circumstances of the search, do not differ in any material respect. See App. 72-75, 130-32, 136-41, 155-69.

Third, a search pursuant to warrant cannot be sustained on the basis of grounds not submitted under oath to the magistrate. See, e.g., *Whiteley v. Warden*, 401 U.S. 460, 564-66 & n.8 (1971); *Spinelli v. United States*, 393 U.S. 410, 413 n.3 (1969); *Aguilar v. Texas*, 378 U.S. 108, 109 n.1, 111-15 (1964); *Giordenello v. United States*, 357 U.S. 480, 486-87 (1958); *Nathanson v. United*

slightest doubt that this is a live case and controversy in which declaratory judgment was entirely proper.

Before the District Court, Petitioners moved to dismiss on the ground, *inter alia*, that there was no continuing controversy. The District Court denied that motion. App. 3. The District Court was plainly correct. Respondents had alleged that Petitioners intended in the future to conduct similar searches (App. 28, at ¶ XXVI) and that they had sought from Petitioners but were refused assurance that the *Daily* search would not be repeated. (App. 27, at ¶¶ XXIV, XXV). Respondents further alleged (App. 28, at ¶ XXVII), and offered uncontradicted evidence to prove (App. 57-147), especially at 76-77, 78-79, 87-89, 133-35, 143-47) that the search of the *Daily* and the threat of its repetition has caused a present and continuing impairment of its ability to gather and report the news. Thus the District Court properly concluded that the *Daily* sought relief as a consequence of an uncontradicted showing that acts of Petitioners caused it present and continuing injury.

States, 290 U.S. 41, 46-47 (1933). Indeed, under California law, material not presented to the magistrate, or not submitted under oath, may not be considered. See Calif. Pen. Code § 1526; *Theodor v. Superior Court*, 8 Cal. 3d 77, 87 & n.5, 104 Cal. Rptr. 226, 501 P.2d 234 (1972).

Fourth, although the question of whether summary judgment was properly granted was raised by Petitioners in the Court of Appeals, it was not included among the issues as to which review was sought in this Court. It is therefore not an issue now before the Court.

Fifth, two courts have found the search in this case to be unreasonable. The litigation has been pending for seven years. If this Court finds the record insufficient for the resolution of the question of reasonableness, it would be appropriate to dismiss the writ of certiorari as improvidently granted.

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FILED

JAN 19 1978

MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1484JAMES ZURCHER, et al., *Petitioners*,

VS.

THE STANFORD DAILY, et al., *Respondents*.**No. 76-1600**LOUIS P. BERGNA, District Attorney, et al., *Petitioners*,

VS.

THE STANFORD DAILY, et al., *Respondents*.

On Writs of Certiorari to the United States Court of Appeals
 for the Ninth Circuit

**PETITIONERS' REPLY TO THE
 BRIEF OF THE UNITED STATES AS AMICUS CURIAE
 AND RESPONDENTS' REPLY BRIEF**

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PETITIONERS' REPLY TO THE
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ARGUMENT

I.

RESPONDENTS MISTAKE THE
POSITION OF THE UNITED STATES

A. The United States Clearly Opposes A Special Rule Governing
Newspaper Searches.

Respondents claim that the United States has recommended a new constitutional rule for newspaper searches. This claim is not well-founded.

Respondents quote the brief of the United States to the effect that the search may be found unreasonable "either because the warrant did not contain necessary restrictions on the manner of its execution or because under the circumstances no search should have been permitted at all." Resp. Reply Brief at 31. This quotation is wrenched from its context. The Government recommends this course if and only if this Court believes that a remand is appropriate because the summary judgment below was rendered on an erroneous theory. Even in that context the government states: "We therefore recommend that the judgment be reversed . . ." U.S. Brief at 31.

Moreover, the United States unequivocally opposes ". . . an-across-the-board modification of the warrant procedure as applied to searches of the press . . ." U.S. Brief at 24. They tell us in the heading that the "First Amendment concerns implicated in the search of a newspaper office do not necessitate interposition of additional procedural obstacles to the issuance of search warrants." U.S. Brief at 22. To guarantee the reasonableness of the search they advocate traditional dependence ". . . upon the discretion of executive officers and, more important, upon the detached judgment of a neutral magistrate . . ." U.S. Brief at 24. Lest there be any doubt we add from the Government's brief: ". . . we oppose the result of the Courts below . . ." U.S. Brief at 24.

B. Legitimate Governmental Interests Would Be Infringed By A Per Se Constitutional Rule.

Respondents next assert that in the Government's brief there is a ". . . total absence of any contention that the decision below, applied to newspaper searches would infringe legitimate law enforcement interests." Resp. Reply Brief at 4. This is not true. The United States simply agreed that under present federal practice and under present circumstances with a neutral press "federal law enforcement would not be seriously hampered." U.S. Brief at 24. But once the neutrality of the press is suspect in any way, every cost enumerated by the United States is fully applicable. For example, it then becomes difficult to distinguish between "suspects and nonsuspects." U.S. Brief at 14. If there are no suspects for a given crime, the "police would be hard-pressed to demonstrate that a subpoena is . . . impractical." U.S. Brief at 15. "Police may wish to inspect the premises or property of so-called third parties . . . related to, or friendly with, the likely perpetrator." U.S. Brief at 15.¹ The police may also need to search premises to which the criminal suspect "has or has had ready access." U.S. Brief at 15.² Thus, the "subpoena first" rule will compel the inclusion of additional material in search warrant applications, "information which . . . may not always

¹Respondents' own editorials clearly show that half of the *Daily's* editorial board thought that the clubbing of the officers was warranted. A. 121-122.

²In 1969 criminal proceedings, the editor of the *Daily* testified that the defendants had been given full access to materials unsuccessfully sought by Government subpoena. A. 150-151.

be readily available³ and which has not heretofore been thought constitutionally required." U.S. Brief at 16. Additionally, subpoenas are not always readily available, even to federal authorities, and even where they are, litigation by the third party may prevent the discharge of the Government's duty to afford the accused a speedy trial. *See* U.S. Brief at 18; *see also United States v. Dionisio*, 410 U.S. 1 (1973).

C. First Amendment Interests Are Amply Protected By Traditional Requirements.

Respondents contend that "certainly the United States does not say . . . that the allowance of newspaper office searches will not do substantial damage to First Amendment interests." Resp. Reply Brief at 5. To the contrary, the Government relied on Mr. Justice White's opinion in *Branzburg* that "the empirical likelihood of any or all of these occurrences is extremely difficult to predict" (U.S. Brief at 29) and in any case are outweighed by the Government's compelling interest in the arrest and convictions of felons. *Branzburg v. Hayes*, *supra*, 408 U.S. at 693-695, 700. The Government's overwhelming concern is that the "subpoena first" rule, even in a press context, not be frozen into constitutional law. U.S. Brief at 24. Rather, we should rely on traditional protections applied by the magistrate with scrupulous

³The "sham" press (*see Branzburg v. Hayes*, 408 U.S. 665, 704, n. 40 (1972)) is most unlikely to proclaim its sympathy as did the *Stanford Daily*. *See* U.S. Brief at 27, n. —.

exactitude. U.S. Brief at 25; *Stanford v. Texas*, 379 U.S. 476, 485 (1965).⁴

II.

**THE GOVERNMENT DID NOT ENDORSE RESPONDENTS'
SECONDARY "FIVE POINT" PLAN**

The Government's brief contains this statement: "If any new restriction is to be imposed upon the procedures antecedent to third party searches, it is imperative that the third party concept be strictly limited to persons or organizations indisputably free of any culpable connection with the offense or relationship to possible offenders." Respondents attribute to this statement the quality of an affirmative suggestion for a new constitutional principle. Resp. Reply Brief at 7. In fact the Government argues strenuously against any new constitutional third-party principle. U.S. Brief at 20-21. What the Government plainly intends by the above statement is a plea for minimizing the damage if their argument against a new constitutional principle is rejected. *See* U.S. Brief at 14-15.

We are also surprised that Respondents take the above statement as the equivalent of the five-factor

⁴An additional concern of the Government is this: "Adoption of the 'subpoena first' rule, modified to apply only to searches of media offices, would represent a judicial endorsement of two classes of First Amendment freedoms, one designed for the majority of American society and one tailored specially for the press." U.S. Brief at 27.

test set forth in their main brief.⁵ Respondents' five-factor test presumes responsibility simply from the "status" of the third party. As the Government shows in its brief, that presumption is not warranted. See U.S. Brief at 9-10, 12, 27 n. —; Bergna Reply Brief at 8-10, n. 13. Because that presumption is not warranted, a third party qualifying under Respondents' five-factor test clearly is not "indisputably free of any culpable connection with the offense or relationship to possible offenders."

Finally, if we do accept Respondents' assertion that their five-factor test embodies the same test as the Government's statement, it is obvious that that test is not met in this case. The search warrant application presented to Judge Phelps made no affirmative showing that the *Daily* was "indisputably free of any culpable connection" with the criminals. That showing was not possible here because, as the record demonstrates, the *Daily* was culpably connected by its policy of evidence destruction and by the sympathy for the criminals that its editorial board announced after the crimes.

⁵This five-factor test would prevent the issuance of the "third party" warrant despite the existence of probable cause, where the warrant application affirmatively shows (1) absence of special relationship to the suspect, (2) special "status" of the third party, (3) grounds to resist compelled production, (4) particularly sensitive privacy interests, and (5) that a subpoena is not otherwise impractical. See Bergna Reply Brief at 10, n. 13.

Respondents surprisingly assert that these factors *were* affirmatively shown in the affidavit herein. Resp. Brief at 41; Resp. Reply Brief at 7. Respondents, however, fail to quote specific language in the affidavit supporting any of the five factors, and we are unable to pinpoint such language. See A. 33-35.

III.

UNDER THE FACTS AND CIRCUMSTANCES OF THIS CASE, IT WOULD BE A MANIFEST INJUSTICE TO AWARD ATTORNEYS' FEES.

A. All Petitioners Must Be Dismissed From The Action Because They Are Not Proper Parties.

Nowhere does the United States dispute that Chief of Police Zurcher and District Attorney Bergna had no connection whatsoever with the acts complained of in this complaint. They are not proper parties to the action. Fees cannot therefore be awarded against them.

The Government also does not dispute that the warrant was duly issued by a neutral and detached magistrate who was dismissed at the Respondents' instance from this cause because there was no showing that he "... acted other than in good faith" (A. 190). Elementary concepts of equity and justice demand that those who simply followed his lawful commands be treated in like fashion.

B. Petitioners Are Immune From An Attorney's Fee Award In This Context.

The Government states that the award of attorneys' fees is justified by the 1976 Civil Rights Attorneys' Fees Awards Act, and that it does not violate petitioners' immunity. U.S. Brief at 38. They then argue that the Act removes any common law immunity. U.S. Brief at 38. This petitioners submit is not so.

Clearly the award of fees can and does destroy judicial immunity.⁶ This is particularly so where

⁶Judicial immunity clearly covers the Court's necessary agents.

fees reach the magnitude awarded in this case and, in addition, include \$10,000 as a reward to counsel for having undertaken the case. In another context it has been said, "The power to tax is the power to destroy." By analogy petitioners assert that the power to award fees against state judges, acting through their agents, may well sound the death knell of an independent judiciary.

C. Fees Awards Should Not Depend On Indemnity.

It has been argued by the U.S. (U.S. Brief at 35, fn. 20) in support of the award that there is a right to indemnity under California law. This is by no means clear, because the statute applies to damages. It is silent regarding costs or attorneys' fees. It also may not apply to punitive damages or allow any indemnity for wilful, as distinguished from negligent, conduct.

It therefore follows that indemnification is currently applied only to damage awards under the Federal Civil Rights Act. Yet the Fees Award Act deals by its terms only with attorneys' fees. If indemnification is the touchstone of federal fee awards it seems that no award may lie in this matter. We submit that to posit fees awards on the existence of indemnification is to put the cart before the horse. Clearly federal jurisdiction should not be controlled by the acts of the state legislatures absent specific federal acquiescence.

CONCLUSION

We affirm our request that this Court reverse the judgment of the Ninth Circuit.

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NOV 12 1977

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Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT.

**BRIEF, AMICI CURIAE, OF AMERICANS FOR
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977.

No. 76-1484.

JAMES ZURCHER, ET AL.,

Petitioners,

vs.

THE STANFORD DAILY, ET AL.,

Respondents.

No. 76-1600.

LOUIS P. BERGNA, ET AL.,

Petitioners,

vs.

THE STANFORD DAILY, ET AL.,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT.

**BRIEF, AMICI CURIAE, OF AMERICANS FOR
EFFECTIVE LAW ENFORCEMENT, INC. AND THE
INTERNATIONAL ASSOCIATION OF CHIEFS OF
POLICE, INC., IN SUPPORT OF THE PETITIONERS.**

This brief is filed pursuant to Rule 42 of the Supreme Court
of the United States. Consent to file has been received in

writing from Counsel for the petitioners. A copy of this letter of consent has been lodged with the Clerk of the Court. Consent to file this brief has been received verbally, by telephone, from the office of counsel for respondents, his written consent will be lodged with the Clerk as soon as it is received.

INTEREST OF THE AMICI CURIAE

Americans for Effective Law Enforcement, Inc. (AELE) is a national, not-for-profit citizens organization incorporated under the laws of the State of Illinois. As stated in its by-laws the purposes of AELE are:

1. To explore and consider the needs and requirements for the effective enforcement of the criminal law.
2. To inform the public of these needs and requirements, to the end that the courts will administer justice based upon a due concern for the general welfare and security of law abiding citizens.
3. To assist the police, the prosecution, and the courts in promoting a more effective and fairer administration of the criminal laws.

In furtherance of these objectives AELE seeks to represent in our courts, nationwide, the concern of the average citizen with the problems of crime and of police effectiveness to deal with crime.

The International Association of Chiefs of Police, Inc. (IACP) represents over 5,000 chiefs and top executives of police departments and other law enforcement agencies in all 50 states and in 85 foreign countries. The IACP serves the law enforcement profession and the public interest by advancing the art of police service. Its aims are to foster police cooperation and the exchange of information and experience among police administrators throughout the world, and to encourage adherence of all police officers to high professional standards of performance and conduct.

Our interest in this case arises from the fact that, although this Court long ago accorded to law enforcement officers the defense of good faith in civil actions against them, *Pierson v. Ray*, 386 U. S. 547 (1967), the award by the lower courts of \$47,500 in attorney's fees against officers who were acting in good faith can, for all practical purposes render that defense nugatory. This holding, if affirmed, will have the gravest consequences upon the effectiveness of law enforcement in this country.

ARGUMENT

Amici will confine ourselves, in this brief, to the issue of the award of attorney's fees in the instant case. We wish, however, to express our agreement with, and to associate ourselves with, the arguments made by counsel for the Petitioners and other *amici* in support of the Petitioners, on every question presented in this case.

Our contention, which we will develop briefly for the Court, is that the award of attorney's fees can well be punitive in nature and that this Court should limit the discretion of trial courts to award such fees in cases in which the demonstrable good faith of law enforcement officers has been proven.

1. The Law Enforcement Officers in the Instant Case Were Acting at All Times in Good Faith.

It would be difficult to devise a factual situation in which the good faith of the law enforcement officers involved was more apparent. They were investigating an incident in which nine police officers were injured, some seriously, by demonstrators at the Stanford University Hospital.¹ They had reason to believe and did believe that photographs depicting the commission of the crimes were in the possession of Respondent, The Stanford Daily.

The teaching of this Court, through the years, has been that law enforcement officers seeking evidence should procure a

1. 353 F. Supp. 124, at 126.

search warrant. *Katz v. United States*, 389 U. S. 347 (1967); *United States v. Chadwick*, U. S., 97 S. Ct. 2476, (1977). This was precisely what the petitioners did; they procured a search warrant, duly issued by a magistrate and fair on its face.

The warrant was served, giving rise to the instant litigation. The United States Court of Appeals for the Ninth Circuit, in its opinion in the instant case, recognized the fact that the Petitioners were acting in good faith at least by implication. The Court of Appeals, however, refused to apply the defense of good faith in cases for injunctive or declaratory relief. (550 F. 2d 464 at 465.)

We believe that this holding does not address itself to the issue now presented. *For the purposes of the award of attorney's fees*, we submit that the question should not be controlled by the form of relief sought (e.g. injunction or declaratory relief as opposed to a claim for civil damages), but whether or not the defendants were, in fact, acting in good faith. It is the latter fact which should control the question of whether or not attorney's fees should be assessed.

As noted, the Petitioners followed the dictates of this Court in procuring a search warrant. This fact, standing alone, should be evidence of good faith but there is a much more compelling aspect to the instant case: The District Court *created new law* enabling respondents to prevail in the instant case. The latter element of this case is patent in the record. The question presented in the trial court was whether law enforcement officers, seeking evidence of crime from third parties, should exhaust the *subpoena deuces tecum* route before proceeding with a search warrant. On this point the trial court stated, with candor, that:

... neither the Court nor the parties have come across any case which discusses the problem of when law enforcement agencies must use a *subpoena deuces tecum* rather than a search warrant. (353 F. Supp. 124 at 127.)

If, as the lower court conceded, there was no law on this particular issue, and the Petitioners were following generally established principles of the law of search and seizure by obtaining a search warrant, the conclusion seems inescapable that they were acting in the utmost good faith.

To be sure, the trial court developed a "lesser-intrusion" rule and held that the Petitioners should have procured a subpoena rather than a search warrant; but this holding was completely *after the fact*. The only way in which a lack of good faith could be shown in this case would be to hold the Petitioners liable for not being clairvoyant and, thus, unable to predict that Judge Peckham would create, *de novo*, his subpoena-rather-than-search-warrant rule.

In sum, the Petitioners acted in accordance with all *existing* standards of the law of search and seizure at the time of the incident in question. Every concept of fundamental fairness to law enforcement officers involved in the day-to-day, difficult and often dangerous task of enforcing the criminal law would be rendered ineffective if their actions must be retroactively condemned by the application of *newly-created* law.

2. The "Four Corners" Rule for Determining Probable Cause in Criminal Cases Should Not Be Applied to Civil Cases When the Defense of Good Faith Is in Issue.

If further evidence of the good faith of the officers involved in the instant case were needed, it is provided by the fact that they actually had ample probable cause to believe that the photographs—the evidence sought—would be destroyed. Concededly, such evidence was not presented within the "four corners" of the search warrant, and, as a result, the trial court refused to consider such evidence. This, we submit, was in error. The trial court intimated that the use of a subpoena might well have been impracticable:

Nor should it matter that the law enforcement agencies did in fact go to the magistrate, *or that probable cause did*

in fact exist to believe that a subpoena was impractical unless such probable cause was established by sworn statements to the magistrate. 353 F. Supp. at 132. (Emphasis supplied.)

Yet, it applied the "four corners" rule in order to deny to the use of Petitioners this most compelling evidence of good faith.

Probable cause as to the impracticability of a subpoena was supplied by the affidavit regarding summary judgment of deputy district attorney Craig Brown, filed in the record in the instant case on July 7, 1972, who recited the belief that the photographs sought in the instant case might be concealed or destroyed, because:

A prior "deletion" of evidence was believed to have taken place in 1969. [Brown Affidavit, ¶ 3, p. 2.]

Prior experience with the plaintiff newspaper indicated that negatives and photographs might be "lost" [¶ 4, p. 3] or "stolen" [¶ 5, pp. 3-4] or deliberately destroyed or removed [¶ 6, p. 4].

The trial court, however, refused to consider this vital evidence in the *civil* case, basing its rationale on the "four corners" rule that all evidence supporting the issuance of a search warrant in criminal cases must be contained in the "four corners" of the warrant affidavit, *i.e.*, that it be in writing and sworn to before the magistrate. *U. S. v. Anderson*, 453 F. 2d 174 (9th Cir. 1971).

While we do not quarrel with the application of the "four corners" rule insofar as the actual issuance of a search warrant in criminal cases is concerned, we believe that the lower court erroneously applied that rule to exclude evidence vital to the position of the defendants in a civil case. *Anderson* relied on Rule 41(c) and ten federal cases cited at footnote 3 at 453 F. 2d 177. We hasten to point out, that nine of these cases involved criminal prosecutions where the government was the "plaintiff." The tenth case dealt with the return of property illegally seized.

The "four corners" rule is applied in criminal cases to search warrants which are issued after an *ex parte* hearing by a magistrate, in which the government *unilaterally* presents its evidence. There are important policy reasons for requiring the government to produce all of its evidence in support of a finding of probable cause, in writing, to a magistrate in a criminal case. This is not the case in this proceeding, which is a civil action in which both parties are represented by counsel and all of the material facts relevant to the conduct of the defendants are in issue, and are generally the subject of civil discovery. There is simply no reason to apply the "four corners" doctrine in this case. To do so will result in a suppression of relevant evidence which is favorable to the defendant, and which evidence the plaintiffs will have every opportunity to challenge in the civil proceeding.

The lower court held, in effect, that the subpoena process was the only proper route for the police to take absent a showing of probable cause to believe that such process was impracticable; yet, when, in the civil case, the defendants tendered such a showing the court rejected it based on the "four corners" doctrine.

This, we believe, confuses the exclusionary rule of *Mapp v. Ohio*, 367 U. S. 643 (1961), which applies to the suppression of evidence in criminal cases, with the exclusion of evidence which is absolutely necessary to the proof of the defendants' case in the instant civil action.

Had the plaintiffs in this action been criminal defendants seeking to suppress evidence illegally seized from them, then the "four corners" doctrine of the exclusionary rule would apply. It is another matter entirely, to extend this doctrine to relevant evidence in a civil case, where the government or a government agent is the defendant, and no penalty or forfeiture is sought against the party in possession of the property. The effect of this ruling on law enforcement would be drastic. Consider the following possible consequences of such a rule:

An officer who has probable cause to effect a warrantless arrest, obtains and serves an arrest warrant issued on insufficiently stated grounds. The officer would be unable to show in a later civil case the existence of probable cause in a suit against him which alleged false arrest.

An officer has probable cause to search an automobile, in a case in which, ordinarily, no warrant would be needed. He nevertheless procures a warrant, and in his haste, omits some of the necessary facts supportive of probable cause. He would not be able to show the underlying grounds justifying the search, and could be held liable for an "illegal" search.

Amici believe that it would be a grievous error to extend the "four corners" doctrine to civil cases in which a police officer is the defendant, thus enabling a civil plaintiff to defeat the search for truth and to avoid a trial on the merits, in cases in which the issue is the officer's liability.

Indeed, such a ruling would defeat the preference for the warrant process, enunciated by this Court in *United States v. Ventresca*, 380 U. S. 102 (1965), for it would penalize the officer who secures a warrant by restricting any defenses he might have in a civil action solely to those facts which he has set down on paper.

We suggest that the language of the U. S. Supreme Court in *United States v. Calandra*, 414 U. S. 338 (1974), is applicable. In that case the lower courts had found that an affidavit in support of a search warrant was deficient, and that the party in possession of the records seized pursuant to the warrant was (a) entitled to their return, and (b) could invoke the exclusionary rule before a grand jury convened to investigate related matters (loansharking). In its 6-3 decision, the Supreme Court reversed, stating:

Thus, standing to invoke the exclusionary rule has been confined to situations where the Government seeks to use such evidence to incriminate the victim of the unlawful search. *Brown v. United States*, 441 U. S. 223, 93 S. Ct.

1565, 36 L. Ed. 2d 208 (1973); *Alderman v. United States*, 394 U. S. 165, 89 S. Ct. 961, 22 L. Ed. 2d 176 (1969); *Wong Sun v. United States*, supra, *Jones v. United States*, 362 U. S. 257, 80 S. Ct. 725, 4 L. Ed. 2d 697 (1960). This standing rule is premised on a recognition that the need for deterrence and hence the rationale for excluding the evidence are strongest where the Government's unlawful conduct would result in imposition of a criminal sanction on the victim of the search. 414 U. S. 348. (Emphasis supplied.)

The fact that there was indeed probable cause to believe that the issuance of a *subpoena deuces tecum* was impracticable in the instant civil case is a major foundation of the defense in this case. Yet, the lower court applied a rule of suppression of evidence in criminal cases to this essential showing in a civil case.

We reiterate that, in a civil case, the court should consider all of the evidence which is relevant to the cause at issue. It should not superimpose doctrines of suppression of evidence, which have heretofore been confined to criminal actions to civil cases in which the evidence is absolutely essential to the defendant's case in general and in particular to the defense of good faith.

At any rate, we believe that the question of the good faith of the Petitioners in the instant case, must be resolved in favor of the Petitioners. If this be true, should attorney's fees be assessed for good faith actions in such cases?

3. The Defense of Good Faith, if Perfected, Should Bar the Award of Attorney's Fees.

We concede, at the outset, that the Civil Rights Attorney's Fees Awards Act of 1976, 42 U. S. C. A. 1988 provides for the award of attorney's fees, at the discretion of the trial court, in civil rights cases. Our argument is, however, that an award of attorney's fees should not be made in cases in which the defendants were acting in good faith.

This argument is premised upon the very practical fact that any such award against a law enforcement officer has a punitive effect on him, even though no such punitive effect would be justifiable, or even intended. It would be ironic indeed if the state of the law should develop to the point at which we say to law enforcement officers: "You acted in complete good faith. Therefore we will not penalize you with civil damages; but of course you must pay anyway, because we assess 'X' amount in attorney's fees against you."

We stressed at the outset of this brief that we were primarily concerned with the question of *fundamental fairness* to law enforcement officers. Perhaps an analogy is apt at this point in order to develop the question of fundamental fairness.

The Federal Civil Rights Act under which the instant case was brought, 42 U. S. C. A. 1983, was enacted to redress violations of civil rights. The Act, by its terms, gives a cause of action against police officers who violate civil rights; and this Court held that the provisions of the Act were applicable to law enforcement officers in *Monroe v. Pape*, 365 U. S. 167 (1961).

The application of the Act to the activities of law enforcement officers *could* have been made absolute: the officer acts at his peril every time that he acts. However, this Court, recognizing the difficulty of "on the street" law enforcement, engrafted the defense of good faith onto the issue of potential liability of law enforcement officers in the case of *Pierson v. Ray*, 386 U. S. 547 (1967), stating:

A policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted for damages if he does. 386 U. S. 554 at 555.

The defense of good faith has developed to the point now where: 1) if an officer subjectively believes that he had probable cause to make an arrest or search; and 2) if, by the objective

determination of the trier of fact, this good faith belief was reasonable; then the officer is entitled to prevail in a civil action. *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 456 F. 2d 339 (2nd Cir. 1972); *Hill v. Rowland*, 474 F. 2d 1374 (4th Cir. 1973); *Rodriguez v. Jones*, 473 F. 2d 599 (5th Cir. 1973); *Tristis v. Backer*, 501 F. 2d 1021 (7th Cir. 1974); *Brubaker v. King*, 505 F. 2d 534 (7th Cir. 1974).

The doctrine of the good faith defense developed in order to prevent the policeman from being held liable for his good faith decisions, made under the exigencies of law enforcement on the street, even if such decisions might be ultimately determined to be mistaken. Compensatory damages can not be awarded if good faith has been properly pleaded and proven.

We submit that the award of attorney's fees for good faith police action, later held to be violative of Constitutional rights, could render the good faith defense nugatory.²

In those states and municipalities which do not indemnify officers,³ the award of attorney's fees penalizes the officer directly. It says to the officer in effect, that: "Your good faith precludes the award of civil damages, but you must, nevertheless, pay attorney's fees."

2. In the brief for Petitioner Bergna and in the brief, *amici curiae*, filed in support of the Petitioners in the instant case by the states of Alabama, Alaska, California, Florida, Georgia, Idaho, Illinois, Indiana, Maryland, Massachusetts, Mississippi, Nebraska, New Mexico, New York, Oregon, Pennsylvania and Texas (hereafter: Brief, *amici curiae*, of Alabama, *et al.*), the issue of whether the award of attorney's fees against a *District Attorney* violates this Court's holding in *Imbler v. Pachtman*, 424 U. S. 409 (1976) has been completely developed. Consequently, we will confine our argument to the impact of the award of attorney's fees upon the defense of good faith as it applies to law enforcement officers.

3. For a listing of those states which do and do not indemnify public employees see: R. Crane and G. Roberts, *Legal Representation and Financial Indemnification of State Employees: A Study* (January, 1977) (American Correctional Association), cited as Appendix A of the Brief, *amici curiae*, of Alabama *et al.*, *supra* N. 3.

The financial security of most police officers is precarious at best. To tell an officer in a non-idemnification state or municipality that he should not be concerned because the award comes out of his "attorney's fees" pocket rather than his "compensatory damages" pocket is purely a matter of semantics. He is still paying, out-of-pocket, for his good faith efforts to enforce the law.

In the instant case we concede, that the State of California, by statute, will indemnify the Petitioners for the award of attorney's fees should Respondents prevail. On paper, such a state of affairs seems equitable. The plaintiffs recover their costs, the defendants are not out of pocket, and a faceless bureaucracy pays the attorney fees. This disregards reality, however.

The current financial situation of almost every government entity leaves no margin for error for large awards against the employees of that municipality. The total award in the instant case was \$47,500. No law enforcement officer, be he the chief of police or a patrolman, should be saddled with the burden, in his personnel record, that his actions cost his employers all or part of such an amount of money.

In theory, of course, the award of attorney's fees against an officer, even though he was acting in good faith, is not punitive but rather a shifting of the burden of litigation. To cost-conscious county administrators and city fathers, however, this distinction may be over-subtle. The personal integrity of law enforcement officers against whom exorbitant amounts of attorney's fees have been levied, and their chances of advancement and promotion will, we submit, in many, if not most cases, be adversely affected.

The award of attorney's fees to the "prevailing party" in cases in which officers were acting in good faith will, penalize as much as an award of damages.

We are not arguing that, when in a given case, the defendant law enforcement officials are found to be liable for damages be-

cause they were *not* acting in good faith attorney's fees should not be assessed under the law. We argue only that when the defense of good faith, which would *preclude* the award of civil damages has been perfected, then the award of attorney's fees should be denied; for, in reality, it has the same effect as a damages award.

We do not quarrel with the intent of the Federal Civil Rights Attorney's Fees Act of 1976. When civil rights are vindicated it strengthens our legal system. But when a law enforcement officer acts in the good faith which would preclude an award of compensatory damages then it is fundamentally unfair to penalize him with an award of attorney's fees.

And, certainly, if the award of attorney's fees is unfair in good faith cases, then the *retroactive* award of attorney's fees under a law enacted *after* the conduct complained of took place only serves to compound this unfairness to the extreme.

We urge this Court to apply to the issue of attorney's fees the same concept of fundamental fairness to law enforcement officers which is inherent in the defense of good faith, upheld by this Court in *Pierson v. Ray, supra*. Congress left open the question of whether liability under the Federal Civil Rights Act (42 U. S. C. A. 1983) should be absolute or qualified. This Court resolved the question by qualifying liability with the defense of good faith. Likewise, Congress, left the decision as to awards of attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976 to the discretion of the court. This Court, we submit, should limit this discretion *only* to cases in which law enforcement officers were acting in bad faith.

CONCLUSION

The law enforcement officers in this case acted in the utmost good faith at all times. The sole reason that the "prevailing party" prevailed was because the trial court created law, *de novo*. The fact that the defense of good faith may not be applicable to cases

in which declaratory or injunctive relief is sought has no bearing upon the question of whether attorney's fees should be awarded.

The award of attorney's fees against the good faith defendant works punitively and unfairly. Particularly so, when, in the instant case, the law providing for the award was applied retroactively. We urge this Court to reverse the judgment of the U. S. Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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Supreme Court, U. S.
FILED

NOV 11 1977

WILLIAM H. ROBAK, JR., CLERK

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**BRIEF OF AMICI CURIAE, THE NATIONAL
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1484

JAMES ZURCHER, et al., *Petitioners*,

v.

THE STANFORD DAILY, et al., *Respondents*.

No. 76-1600

LOUIS P. BERGNA, et al., *Petitioners*,

v.

THE STANFORD DAILY, et al., *Respondents*.

ON WRITS OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

**BRIEF OF AMICI CURIAE, THE NATIONAL
DISTRICT ATTORNEYS ASSOCIATION AND THE
CALIFORNIA DISTRICT ATTORNEYS
ASSOCIATION, IN SUPPORT OF PETITIONERS**

INTEREST OF AMICI CURIAE

This brief is filed with this Court pursuant to the authority
of Rule 42, paragraph 2, of the Rules of the Supreme Court.^{1/}

^{1/} Written consent of the parties has been obtained and with the
cover letter is enclosed as part of the package containing this brief.

The National District Attorneys Association is a non-profit, non-political, tax-exempt corporation, composed of approximately 6,000 members, representing all fifty states. The purposes of the National District Attorneys Association are, *inter alia*, to improve and to facilitate the administration of justice in the United States and to promote the study of law in legal institutions.

The California District Attorneys Association is a non-profit, public service corporation, composed of the State's 58 elected District Attorneys, two elected City Attorneys principally engaged in the prosecution of criminal cases, and more than 1,200 deputy prosecutors.

The purposes of the California District Attorneys Association are, *inter alia*, to endeavor to improve the administration of criminal justice, to foster and maintain the highest ethical and professional standards of all persons engaged in the prosecution of offenses under California laws, to apply the knowledge and experience of its members in the field of criminal law to the promotion of the public good, and to promote the common welfare of the criminal justice system in areas of mutual concern such as appellate review, training, communication, public education and the equal administration of law.

The organizations seek to make known the views of prosecutors in the United States, in California, and to bring before this Court their positions on matters affecting the discharge of the duties of prosecutors in their everyday work.

The decision of the Court of Appeals, Ninth Circuit, in *Stanford Daily v. Zurcher*, 550 F.2d 464 (1977), adopting the opinion of the District Court in the same case, reported in

353 F.Supp. 124 (N.D. Cal. 1972), engrafts upon the laws governing searches and seizures wholly new requirements which portend the demise of the search warrant as an effective instrument in the enforcement of criminal law. Moreover, the decision imposes personal pecuniary liability upon prosecuting attorneys who become involved, directly or indirectly, in the issuance of search warrants, notwithstanding the facts of their good faith and their compliance with existing requirements for search warrants. The imposition of such liability will prevent prudent prosecutors from becoming involved in the issuance of any search warrants in the future.

Crime in the United States has grown to such proportions that it is only through vigorous prosecution that our society can function. If a prosecutor cannot obtain evidence or must look over his shoulder in each case in which he is involved in order to protect himself and his family from the possibilities and uncertainties of paying legal fees, the effectiveness of the criminal justice system may not only be reduced but it is quite possible in many instances that prosecution may not even begin.

The case at bar raises the foregoing issue and is therefore of utmost concern to the prosecutors of the United States. Amici curiae believe the decision of the Court of Appeals contains egregious errors of law, and further believes this brief will assist this Court in reaching the correct and just decision on the questions presented.

QUESTIONS PRESENTED

The basic question is whether the traditional rules governing issuance of search warrants are inadequate to protect the right of privacy, and must be augmented by new rules. A companion issue is whether newspaper offices and other places should be given a privileged status under the Fourth Amendment, effectively making them sanctuaries impervious to search warrants. The other question is whether policemen, prosecuting attorneys, and a judge should be held financially liable for their involvement with a search warrant which was issued according to traditional rules and executed lawfully.

ARGUMENT

I

THE GENERAL RULE ADOPTED BY THE COURT OF APPEALS, RESTRICTING THE USE OF A SEARCH WARRANT FOR THE PROPERTY OF ANY PERSON WHO IS NOT A KNOWN SUSPECT, HAS NO FOUNDATION IN LAW AND SHOULD BE REJECTED AS A MATTER OF POLICY.

The new rule adopted by the Court of Appeals was expressed by the District Court in the following terms:

"[L]aw enforcement agencies cannot obtain a warrant to conduct a third-party search unless the magistrate has probable cause to believe that a subpoena duces tecum is impractical. Any evidence that a subpoena is impractical must be presented in a sworn affidavit if the magistrate is to rely on it."

"[T]he mere failure to respond to a subpoena duces tecum should not, without more, be grounds for issuing a search warrant. The normal remedy is a contempt proceeding . . . Thus, even if the subpoena has been disregarded, it is questionable if a magistrate should still issue a warrant."

"[A] subpoena can be impractical if the destruction of evidence is threatened . . . A court certainly possesses the power to issue a restraining order where it is presented with evidence that the materials are about to be taken from the jurisdiction or their destruction is imminent . . . Only if it appears that the materials will be destroyed or removed from

the jurisdiction despite the restraining order, or that there simply is not time to obtain a suitable order, should a magistrate find probable cause to believe that a subpoena is impractical." *Stanford Daily v. Zurcher*, 353 F.Supp. 124, 132-133 (1972).

The foregoing rule is of constitutional magnitude: "... unless the magistrate has before him a sworn affidavit establishing proper cause to believe that the materials in question will be destroyed, or that a subpoena duces tecum is otherwise 'impractical,' a search of a third party for materials in his possession is unreasonable per se, and therefore violative of the Fourth Amendment." (353 F.Supp. at p. 127.)

The premise for the rule is an assertion that third parties--those not suspected of a crime--are entitled to greater protection under the Fourth Amendment than those suspected of a crime. (353 F.Supp. at p. 127.)

The enormous impact of this rule upon the states and law enforcement cannot be understated.

The search warrant has been a most important means of obtaining evidence in criminal cases.^{2/} To resort now to other means of obtaining evidence will inevitably delay and frustrate criminal investigations and prosecutions to the point that the administration of justice will be unjustifiably burdened. In order to respond to the problems created by such a rule, states will be forced to make massive and complex

^{2/} The importance of search warrants to law enforcement is indicated by the fact that in a single local jurisdiction, San Diego County, California, 1168 search warrants were issued by state magistrates in a single year, October 1, 1976, to October 1, 1977.

changes in their criminal laws. Statutes of limitation will have to be extended, and grand juries multiplied so that subpoenas duces tecum could be more readily available. These and other changes will disrupt the fair and efficient administration of criminal justice by the states. The ultimate cost to society cannot be predicted easily.

Such a rule would adversely affect past investigations as well as those arising in the future. Countless pending cases would be damaged or destroyed because they depend upon evidence secured by search warrants which do not comply with this rule. If the rule were given retroactive effect, it would reap a harvest of chaos in the field of criminal justice which could plague the courts for years, demoralize law enforcement, and substantially diminish public respect for our legal system.

Since the states have the primary responsibility for administering criminal laws, due respect for that responsibility requires a careful consideration of the impact upon the states of this rule and weighs against its hasty imposition.

Thus, when the Court adopted the exclusionary rule, *Weeks v. United States*, 232 U.S. 383, 58 L.Ed. 652, 34 S.Ct. 341 (1914), it waited almost fifty years before imposing the same rule upon the states, *Mapp v. Ohio*, 367 U.S. 643, 6 L.Ed.2d 1081, 81 S.Ct. 1684 (1961). During the interim, the Court gave careful consideration to the judgment and experience of the states, *Wolf v. Colorado*, 338 U.S. 25, 93 L.Ed. 1782, 69 S.Ct. 1359 (1949), and gave the states an opportunity "to determine which rules best serves them," *Irvine v. California*, 347 U.S. 128, 134-137, 98 L.Ed. 561, 74 S.Ct. 381 (1954). Moreover,

imposition of the exclusionary rule upon the states was foreshadowed by *Wolf v. Colorado, supra*; *Irvine v. California, supra*; *Rea v. United States*, 350 U.S. 214, 100 L.Ed. 233, 76 S.Ct. 292 (1956); and *Elkins v. United States*, 364 U.S. 206, 4 L.Ed.2d 1669, 80 S.Ct. 1437 (1960).

Justification for the proposed rule begins with the assertion that third parties, those persons not suspected of a crime, are entitled to greater protection under the Fourth Amendment than those suspected of a crime. The assertion is stated as a self-evident truth, for no statute, decision, or constitutional provision is cited as direct authority for the proposition. An examination of pertinent authorities reveals that they contradict, rather than support, the assertion.

The Constitution of the United States does not support the distinction asserted by the Court of Appeals. The Fourth Amendment protects the right of the "people" to be secure against unreasonable searches and seizures. The Fourteenth Amendment protects every "person" against deprivation of due process by a state. It is, of course, through that provision of the Fourteenth Amendment that the Fourth Amendment is enforceable against the states. *Mapp v. Ohio, supra*, 367 U.S. at p. 655. Neither Amendment suggests that persons regarded by police as suspects should receive less protection, and that those regarded as non-suspects should receive more protection. All persons, suspect and non-suspect alike, are protected equally against unreasonable searches, and, conversely, are subject equally to reasonable searches. If support for a distinction between the protection afforded non-suspects and that afforded suspects is to be found, it must be found, if at all, outside the Constitution.

The opinions of this Court do not offer support for the distinction. As early as *Weeks v. United States, supra*, this Court said the protection of the Fourth Amendment "reaches all alike, whether accused of crime or not" (232 U.S. at p. 392). In *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 75 L.Ed. 374, 51 S.Ct. 153 (1931), this Court stated the Fourth Amendment "protects all, those suspected or known to be offenders as well as the innocent" (282 U.S. at p. 357).

In *United States v. Kahn*, 415 U.S. 143, 39 L.Ed.2d 225, 94 S.Ct. 977 (1974), the Court clearly indicated that the legality of a seizure pursuant to a search warrant depends in part upon the character of the property seized, and not upon whether its possessor was identified in the warrant as a suspect. The Court cited, and quoted from, *United States v. Fiorella*, 468 F.2d at p. 691: "The Fourth Amendment requires a warrant to describe only 'the place to be searched, and the persons or things to be seized,' not the persons from whom things will be seized" (415 U.S. at p. 155, n. 15).

It is evident that the decisions of this Court constitute an unbroken chain of authority against the proposition that some persons are entitled to greater protection under the Fourth Amendment than are others.

None of the applicable statutes support the distinction between suspects and non-suspects. In federal cases the issuance of search warrants is governed by Federal Rules of Criminal Procedure, Rule 41, 18 U.S.C. Nothing in that rule prohibits or limits search warrants for evidence in the possession of non-suspects. The California statutes governing the issuance of search warrants, Penal Code Sections 1523-1529, make no distinction between suspects and non-suspects.

Moreover, federal and California laws permit all persons to move for return of property which was seized illegally. Federal Rule 41(e) permits a "person aggrieved by an unlawful search and seizure" to so move. Such a motion is distinct from the motion to suppress evidence which is available to criminal defendants under Rules 12 and 41(f). Similarly, California permits a "defendant" to move for suppression of evidence or return of property under Penal Code Sections 1538.5 and 1539, and permits a "person" to move for return of property under Penal Code Sections 1539 and 1540. Both federal and California laws clearly provide non-suspects with a remedy for unlawful seizures, and clearly contemplate that evidence may be seized from persons who were not implicated in any crime. Nothing in those statutes remotely suggests that a search warrant for a non-suspect's property is invalid absent a showing that a subpoena is impractical.

Clearly, the rule adopted by the Court of Appeals is unprecedented. It imports wholly new and unexpected requirements into the Fourth Amendment. Such a drastic change in the law governing search warrants would be tolerable if it were supported by compelling reasons. However, such reasons do not appear.

In support of the rule, it is said that privacy is of such great value that only necessary intrusions should occur. Amici curiae do not disagree. However, it is further stated that search warrants are unnecessary in most situations involving non-suspects since a less drastic means, a subpoena duces tecum, exists to achieve the same end (353 F.Supp. at p. 131). That proposition is unsound.

The Fourth Amendment is designed to prevent unreasonable searches and, at the same time, to provide a means for obtaining evidence with certainty, speed and security. A subpoena, however, is frequently not available during the evidence-gathering phase of an investigation, offers little certainty that the evidence will ever be obtained and virtually no security against the destruction of evidence. Additionally, the subpoena process is generally too slow to meet investigative needs.

It is also stated, in support of the new rule, that as a historical matter the notion of search warrants has involved only those persons suspected of crime (353 F.Supp. at p. 131). The only cited decision in support of the statement is *Henry v. United States*, 361 U.S. 98, 4 L.Ed.2d 134, 80 S.Ct. 168 (1959), which briefly refers to the history of general warrants and writs of assistance, but does not assert or purport to demonstrate that search warrants have involved only those suspected of a crime. Other decisions of this Court, on the contrary, suggest that--as a historical matter--search warrants have involved all property which is contraband, fruits or instrumentalities of crime, and evidence of crime, regardless of the culpability of the person who owned or controlled the premises searched. *Steele v. United States*, 267 U.S. 498, 69 L.Ed. 757, 45 S.Ct. 414 (1925); *United States v. Jeffers*, 342 U.S. 48, 96 L.Ed. 59, 72 S.Ct. 93 (1951).

The Court of Appeals stated one reason for the rule is a desire to provide third persons with meaningful protection against unlawful searches (353 F.Supp. at pp. 131-132). That statement glosses over the distinction between searches with a warrant and without a warrant. The people are protected against unlawful searches with a warrant by both the

constitutional interposition of an impartial magistrate, and, to a lesser extent, by the existence of the exclusionary rule. The exclusionary rule may be the only protection against unlawful warrantless searches, but that circumstance is irrelevant to the question now before this Court.

Another reason for the new rule according to the Court of Appeals consists essentially of an analogy between arrests and searches: since a material witness cannot be arrested to secure his presence unless a subpoena is impractical, it follows *ipso facto* that a non-suspect cannot be searched unless a subpoena duces tecum is impractical (353 F.Supp. at p. 132). The analogy is erroneous. It fails to consider and balance the various interests involved in searches and seizures.

Our interest in personal liberty forbids the arrest of an innocent person who, without more, happens to be a material witness to a crime. We recoil from the prospect of such an arrest because it is commonly understood that witnesses will attend judicial proceedings without the necessity of a forcible deprivation of personal liberty. However, when it is probable that a material witness will not attend a proceeding despite a subpoena, our interest in effective law enforcement outweighs our interest in personal liberty, and permits his arrest. That rule springs from practical necessity, and is in accord with common sense and the Constitution.

However, notwithstanding the fact that an arrest infringes a particularly cherished value, personal liberty, the apprehension of criminals is so important that the validity of an arrest of a suspect is not made dependent upon a showing that other means were impractical.

The provision for search warrants represents a constitutional compromise between the right of an individual citizen to be left alone and the right of society to defend itself against the menace of crime. Search warrants are permitted because it is generally understood that other means of obtaining evidence lack the speed, security, and certainty which are necessary to a successful investigation and prosecution of crime. Although search warrants infringe important values, the acquisition of evidence of crime is so important that the validity of a search warrant has never been made dependent upon a showing that other means were impractical. To impose a requirement of such a showing now would be to reverse the balance which has traditionally been struck between the interests involved. No argument has been advanced which requires that the scales be tipped against the interest in law enforcement, and that search warrants be made more vulnerable to invalidation than they already are. The rule announced by the Court of Appeals should be rejected because it is unworkable and because it shifts the balance of constitutional interests too far against the general welfare of the nation.

A. The proposed rule is unnecessary for the protection of the right of privacy. Adequate protections against, and remedies for, unlawful invasions of privacy already exist.

The rule requiring the use of a subpoena duces tecum in lieu of a search warrant is based, in part, on the view that absent such a rule a third party would have no meaningful protection against or remedy for an unlawful search pursuant to a warrant. This view arises from a belief that the exclusionary rule is the chief remedy and protection against unlawful

searches, and that third parties receive no protection from the exclusionary rule (353 F.Supp. at pp. 131-132). In adopting this view the Court of Appeals ignored several important considerations.

Unlike a warrantless search, a search pursuant to a warrant cannot occur until an impartial magistrate has judged the cause to be sufficient and has authorized the search, carefully circumscribing its scope. A search warrant can be issued only by a neutral magistrate, not by a policeman or a prosecutor. *Coolidge v. New Hampshire*, 403 U.S. 443, 29 L.Ed.2d 564, 91 S.Ct. 2022 (1971). This constitutional interposition of a magistrate between the police and the citizen constitutes the chief protection against unlawful searches pursuant to a warrant. Moreover, this protection shields all citizens, the accused and non-accused alike. See *Go-Bart Importing Co. v. United States*, *supra*, 282 U.S. at p. 357.

The exclusionary rule, requiring suppression of illegally obtained evidence, theoretically provides some additional protection for all citizens by deterring unlawful searches. *Stone v. Powell*, 428 U.S. 465, 486, 49 L.Ed.2d 1067, 96 S.Ct. 3037 (1976). Its efficacy as a deterrent is a matter of grave doubt. *United States v. Janis*, 428 U.S. 433, 446-453, 49 L.Ed.2d 1046, 96 S.Ct. 3021 (1976). However, assuming that it is effective, various factors tend to distribute its benefits among the non-accused as well as the accused.

California, for instance, has a so-called vicarious exclusionary rule: a defendant has standing to seek suppression of any illegally seized evidence which is offered against him, regardless of the fact he has no possessory interest in the

premises searched and the property seized. *Kaplan v. Superior Court*, 6 Cal.3d 150, 491 P.2d 1 (1971). That rule protects equally the privacy right of the non-accused and the accused. In other jurisdictions, where a stricter standing rule prevails, the exclusionary rule often protects the privacy rights of the non-accused by giving the accused standing to seek suppression based on his possessory interest in the evidence seized, notwithstanding the fact he had no possessory interest in the premises searched. *Simmons v. United States*, 390 U.S. 377, 19 L.Ed.2d 1247, 88 S.Ct. 967 (1968). Thus, it cannot be said fairly that the exclusionary rule offers no meaningful protection to the non-accused.

Aside from the protections which exist prior to a search, the law provides remedies for all citizens in equal measure after an illegal search and seizure has been made. A major remedy for all persons, accused or not, is the provision for a motion to return the property which was seized. California Penal Code Sections 1539 and 1540; Federal Rules of Criminal Procedure, Rule 41(e). Another remedy consists of an action for damages for violation of civil rights. *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 29 L.Ed.2d 619, 91 S.Ct. 1999 (1971). Such remedies may be imperfect, but it cannot be contended that they are less available to the non-accused than to the accused.

The Court of Appeals has adopted a rule which would apply in every jurisdiction, state and federal. In so doing, the Court ignored the fact that privacy protections vary considerably from one jurisdiction to another. For example, California laws provide special protections for the financial privacy of all persons, suspects or not. *Burrows v. Superior Court*, 13 Cal.3d 238, 529 P.2d 590 (1974); California Government Code Section

7460, *et seq.* The same protections are not provided by federal law. *United States v. Miller*, 425 U.S. 435, 48 L.Ed.2d 71, 96 S.Ct. 1619 (1976). Thus, in failing to review the differences in protections afforded by state and federal laws, the Court of Appeals failed to consider whether its rule was appropriate for the states. The Court apparently assumes a rule which may be appropriate for federal cases must be appropriate also for state cases.

In many future cases the proposed rule will effectively expand the exclusionary rule, by providing a new basis for invalidating a search warrant. The Court of Appeals evidently believes such an expansion is necessary to protect the privacy of third persons. That belief is directly contrary to the views expressed by this Court in refusing to expand the exclusionary rule. *Alderman v. United States*, 394 U.S. 165, 171-176, 22 L.Ed.2d 176, 89 S.Ct. 961 (1969). The rule espoused by the Court of Appeals is, in fact, neither necessary nor desirable.

B. The proposed rule is impractical. It creates an unreasonable risk evidence will be destroyed. A subpoena duces tecum is impractical as a substitute for a search warrant because the process frequently cannot meet legitimate needs of law enforcement.

The requirement of a subpoena, instead of a search warrant, is based upon an assumption that law enforcement officers can easily distinguish between suspects and non-suspects during the evidence-gathering stage of an investigation. That assumption ignores reality. In fact, in many cases when the police learn of the commission of a crime, they have little or

no idea of the culprits' identities. The process of obtaining evidence, including physical evidence, has as one of its purposes the identification of suspects.

If law enforcement agents are prohibited from using a search warrant, and are required to use a subpoena, to obtain evidence from any person who has not yet been identified as a suspect, then there is a real possibility that the person subpoenaed may be a principal or an accomplice in the crime. Thus, such a requirement creates an unreasonable risk of destruction of evidence.

Moreover, the distinction between suspects and non-suspects does not take into account the possibility that the person subpoenaed may be a friend, a relative, or a criminal associate of the perpetrator. Such a person, though not personally involved in the crime, may be highly motivated to destroy evidence linking the criminal to the crime. Such motivation is often difficult to discern and more difficult to prove.

The use of the concept of "known suspects" by the courts below creates considerable uncertainty about the propriety of using a search warrant in many cases. Police may view a person as a suspect simply because he had a motive or an opportunity to commit the crime, or because he has a record of similar offenses. The spectrum of suspicion may range from a mere hunch to probable cause. Nothing in the opinions below indicates the amount of suspicion which would be sufficient to permit the use of a search warrant, nor whether the basis of that suspicion should be set forth in the affidavit for the search warrant. The uncertainty of the rule will create great confusion in the courts and among law enforcement agencies, and will inevitably invite litigation.

The cases under review here demonstrate the danger of the subpoena requirement. For all that the police knew, the mob which criminally assaulted the officers could have included members of the staff of the *Stanford Daily*. The fact that none of the staff was a "known suspect" did not diminish the danger that members of the staff would destroy the evidence sought, either because of complicity in the offense or because of sympathy for the offenders.

A search warrant offers a high degree of security against destruction of evidence, whereas a subpoena does not. A search warrant gives the possessor of evidence little or no notice that a seizure is imminent, thus minimizing the danger of destruction.^{3/} A subpoena, of course, provides notice and gives ample opportunity for destruction of evidence. Use of subpoenas to obtain evidence from persons who may be criminals or accessories, sympathizers, or associates of criminals is likely to increase the common phenomenon of destruction or concealment of evidence. Moreover, the penalties for contempt and destruction of evidence may be quite lenient compared to the penalties for the crimes to which the evidence may relate.^{4/} Such lenient penalties are a weak deterrent to the destruction of evidence.

^{3/} In *Ker v. California*, 374 U.S. 23, 10 L.Ed.2d 726, 83 S.Ct. 1623 (1963), this Court held that in the execution of a search warrant no notice need be given to occupants when a danger of destruction of evidence exists (374 U.S. at pp. 37-41). The Court of Appeals, however, would require that substantial notice be given through the subpoena process unless the applicant for a warrant has overwhelming proof that destruction of evidence is imminent and otherwise unpreventable.

^{4/} The maximum penalty in California for destruction of evidence or contempt is six months in jail and a \$500 fine. California Penal Code Sections 19, 135, and 166. At the time of the incident at Stanford, the maximum penalty for battery upon a peace officer was ten years in prison and a \$5000 fine. California Penal Code Sections 243 and 672.

The foregoing reasons, alone sufficient to demonstrate the impracticality of the subpoena requirement, do not exhaust the problems raised by the rule espoused by the Court of Appeals. Other reasons for rejecting the subpoena requirement include the unavailability of subpoenas, the slowness of the subpoena process, and the potential futility of the process.

California law permits no more than one grand jury in any single county to return indictments. California Penal Code Sections 904, 904.5-904.9. The regular grand jury is charged with many duties in addition to its indictment function. California Penal Code Sections 914.1, 919, 920, 922, 925, 925a, 927, 928, 933, and 933.5. Consequently, most criminal cases in California are prosecuted by complaint and information, not by indictment.^{5/}

A complaint must not be filed until probable cause exists to accuse a particular person.^{6/} Frequently a prosecutor does not know that probable cause exists to accuse a person until the investigation, including the gathering of physical evidence, is substantially completed. However, until a complaint has been filed neither the prosecutor nor anyone else has any power to

^{5/} In 1974, for example, of the 53,441 felony cases prosecuted in Superior Courts, only 1,902 or 3.6% were prosecuted by indictment. *California Criminal Justice Profile*, Bureau of Criminal Statistics, California Department of Justice (1976).

^{6/} See California Government Code Section 26501, and California Business and Professions Code foll. Section 6076, rule 7-102. See also ABA Standards, Compilation, p. 91, §3.9(a). Unless a prosecutor knows or believes he has probable cause to accuse a person, it is evidently unethical for him to file a complaint against that person.

issue a subpoena compelling the production of evidence in court. California Penal Code Sections 1326-1328. Thus, during the pre-complaint, evidence-gathering phase of a criminal investigation, a judicial subpoena is simply not available for the production of evidence.

A grand jury subpoena is available during the evidence-gathering phase, but its availability is so limited that it is not an adequate substitute for a search warrant. Since a grand jury subpoena is invalid in the absence of a pending grand jury investigation, and a grand jury investigation can be initiated only by the grand jury itself, not the District Attorney or the police, law enforcement officers do not have a independent legal power to issue valid grand jury subpoenas. *In re Peart*, 5 Cal.App.2d 469, 43 P.2d 334 (1935). Thus, like a search warrant, the availability of a grand jury subpoena is limited by the discretion of an independent authority. More importantly, the volume of criminal cases is so immense that a single grand jury, devoting all its time to criminal matters, could deal with only a small fraction of them. Consequently, if a grand jury subpoena were required in lieu of a search warrant, law enforcement agents would be required as a practical matter to ignore many crimes.

The impracticality of using a grand jury subpoena is particularly acute in California when the evidence sought consists of financial records held by financial institutions. Such evidence is necessary in a prodigious number of cases, especially those involving insufficient funds checks, embezzlement, and other frauds. A grand jury may obtain such evidence by subpoena only when a majority of its members resolves to do so, a showing of probable cause is made to a superior court judge, and the judge personally signs

and issues the subpoena. California Government Code Section 7476(b). Given the time-consuming nature of that process, the great volume of criminal cases, and the laws limiting the number of grand juries, a grand jury subpoena is obviously not an adequate substitute for a search warrant.

Even if drastic changes were made in the laws governing subpoenas, making judicial subpoenas and grand jury subpoenas available both in fact and law during the evidence-gathering stage, a subpoena would still not be an adequate substitute for a search warrant.

Speed in obtaining evidence is frequently essential to a successful investigation and prosecution. When an item of evidence is obtained quickly, it can lead to the immediate discovery of other physical evidence and witnesses. Rapid investigation minimizes the hazards of fading memories, loss or destruction of physical evidence, and intimidation or corruption of witnesses.

The speed with which evidence may be obtained by a search warrant is well known. Laws permitting so-called "telephonic" search warrants tend to accelerate the process. See California Penal Code Sections 1526 and 1528. Moreover, since litigation of the validity of a search warrant follows rather than precedes the securing of evidence pursuant to a warrant, such litigation does not impede the investigation.

By contrast, a subpoena involves a slow process. Unlike a search warrant, a subpoena cannot be issued until the identity of the possessor of evidence is learned. It cannot be served until his location is determined. If the person is not present within the local or state jurisdiction, special

proceedings must be undertaken. See California Penal Code Sections 1330 and 1334.3. Moreover, since a subpoena commands an appearance before a court or a grand jury, the time of production of evidence depends upon the convenience of the proper forum. Finally, litigation of a subpoena precedes production of the evidence. Such litigation may consume years,^{7/} irreparably damaging an investigation. The hazards attending the inherent delays in the subpoena procedure are too great to make a subpoena an adequate substitute for a search warrant.

In *United States v. Calandra*, 414 U.S. 338, 38 L.Ed.2d 561, 94 S.Ct. 613 (1974), this Court declined to permit grand jury witnesses to invoke the exclusionary rule as a bar to questioning. A major reason for the decision was that a contrary rule would create intolerable delays in grand jury investigations. That same reason requires rejection of the rule espoused by the Court of Appeals.

A final reason for rejecting the subpoena requirement is the potential futility of the process. Considering the enormous difficulty in overcoming a claim of privilege under the Fifth Amendment's self-incrimination clause (see *Maness v. Meyers*, 419 U.S. 449, 42 L.Ed.2d 574, 95 S.Ct. 584 (1975)), a person in possession of evidence can successfully resist a subpoena by asserting such a claim. That same person,

^{7/} For example, enforcement of a summons to one Solomon Fisher was delayed by litigation for more than four years after its service. See *United States v. Fisher*, 352 F.Supp. 731 (1972); *United States v. Fisher*, 500 F.2d 683 (1974); *Fisher v. United States*, 425 U.S. 391, 48 L.Ed.2d 39, 96 S.Ct. 1569 (1976). Another lengthy delay is shown in *Couch v. United States*, 409 U.S. 322, 34 L.Ed.2d 548, 93 S.Ct. 611 (1973). In view of statutes of limitation and other factors, such delays can be fatal to a prosecution.

however, cannot successfully resist a search warrant. *Andresen v. Maryland*, 427 U.S. 463, 49 L.Ed.2d 627, 96 S.Ct. 2737 (1976). Thus, a search warrant provides greater certainty that the evidence will be obtained, and, at the same time, fully protects the Fourth and Fifth Amendment rights of the person or persons involved.

In summary, a subpoena is an unacceptable substitute for a search warrant because it entails an unreasonable risk of destruction of evidence, it is not sufficiently available when it is most needed, its inherent slowness unreasonably delays the investigative process, and legal barriers can render it an entirely futile device for obtaining evidence. In view of these factors, the language of *United States v. Janis*, *supra*, is particularly apropos:

"There comes a point at which courts, consistent with their duty to administer the law, cannot continue to create barriers to law enforcement in the pursuit of a supervisory role that is properly the duty of the Executive and Legislative Branches. We find ourselves at that point in this case." (428 U.S. at p. 459.)

II

THE SPECIAL RULE LIMITING THE USE OF A SEARCH WARRANT FOR A NEWSPAPER OFFICE HAS NO LEGAL FOUNDATION AND SHOULD BE REJECTED.

In this case the Court of Appeals has adopted a rule which states a search warrant for a newspaper office shall be permitted only in those rare circumstances in which there is a clear showing that (1) important material will be destroyed or removed from the jurisdiction, and (2) a restraining order would be futile (353 F.Supp. at 135). The Court explained its new rule was based on three considerations:

- the indiscriminate nature of a search, pursuant to a warrant for particular objects, would render other "confidential" materials vulnerable to police examination;
- the ex parte issuance and execution of a search warrant would deprive the media and journalists of judicial control;
- there is a possibility that police searches would jeopardize a newspaper's credibility and create a risk of self-censorship (353 F.Supp. at pp. 134-135).

An examination of the foundation for the new rule reveals the reasoning to be neither compelling nor persuasive.

It is said that exposure of confidential materials poses a staggering threat to the gathering of news. As a matter of historical fact, that statement is false. For almost 200 years

"confidential" information and sources of newsmen have been subject to exposure. Nevertheless, the press has flourished. *Branzburg v. Hayes*, 408 U.S. 665, 698-699, 33 L.Ed.2d 626, 92 S.Ct. 2646 (1972). Additionally, it is somewhat naive to believe that an elected public prosecutor or an appointed United States Attorney would indiscriminately search the offices of a powerful media organization such as the Los Angeles Times. The political and public backlash could be career-crushing. Because of powerful, organized media support, no prosecutor would unnecessarily search a minor journalistic facility for the same reason. Therefore, the burden, if any, which possible exposure imposes on news gathering is uncertain and insufficient to override the public interest. *Branzburg v. Hayes*, *supra*, 408 U.S. at pp. 690-691, 706.

The issuance of search warrants is a judicial function, and judicial control is inherent in the process. Indeed, the judiciary has more control over search warrants than it does over grand jury subpoenas. A grand jury subpoena may be issued before probable cause has been found to believe any crime has been committed. The power to issue a subpoena before probable cause has been established is a necessary adjunct of the grand jury's traditional investigative power. *United States v. Dionisio*, 410 U.S. 1, 35 L.Ed.2d 67, 93 S.Ct. 764 (1973). By contrast, a magistrate's constitutional obligations prohibit him from issuing a search warrant until probable cause has been established under oath. Thus, the courts are in a much better position to restrain abuses through the search warrant process than through the subpoena process. After execution of a warrant the courts exercise control through a process of review.

Finally, the possibility that search warrants will jeopardize a newspaper's credibility and create a risk of self-censorship is said to justify the rule permitting subpoenas and forbidding search warrants. Ironically, similar arguments have been advanced against the use of subpoenas, but have been rejected. *Branzburg v. Hayes*, *supra*, 408 U.S. at p. 679. The public interest in successful criminal investigations demands that the police be permitted to use the most effective legal process for gathering physical evidence. That process is also the one most subject to judicial control—the search warrant.

As this Court made quite clear in *Stanford v. Texas*, 379 U.S. 476, 13 L.Ed.2d 431, 85 S.Ct. 506 (1965), history teaches us that the Fourth Amendment was in large measure a response to attacks upon the press by means of the general warrant. The Fourth Amendment was designed in part to guarantee the freedom of the press by requiring particularized warrants. It would indeed be a sad comment upon the Fourth Amendment to hold now that it is generally unable to keep that historic promise of protection.

The proposed rule is simply unnecessary for protection of freedom of the press. The press is sufficiently protected by the Fourth Amendment and the exclusionary rule. The sufficiency of those protections is amply demonstrated by the history of the press in this country. The power to search newspaper offices pursuant to a warrant has existed for a very long time. Concurrently, the press has fulfilled its societal function with a success unmatched in the world. Clearly, freedom of the press and the power of government to search have coexisted with relative peace. There is no valid reason to believe that at this point in our history survival of that freedom requires annihilation of that power.

A. The special rule regarding newspapers is more impractical than the general rule adopted by the Court of Appeals because it imposes an unreasonable burden of proof upon an applicant for a search warrant.

The proposed rule regarding searches of newspaper offices is impractical and destructive of society's interest in effective law enforcement for essentially the same reasons stated above concerning search warrants of other premises. The subpoena procedure is too slow, too uncertain, too lacking in security, and insufficiently available. In addition, it is impractical to require investigators to make a "clear showing" that evidence "will be destroyed or removed" or that a restraining order "would be futile," as a condition precedent to issuance of a search warrant for a newspaper office.

In the initial evidence-gathering stage of an investigation, the investigators ordinarily do not know who is likely to destroy evidence or ignore a restraining order. To require investigators to make a clear showing that such conduct will or would occur in the future is to require them to exercise precognitive powers possessed by few, if any, mortals. If, as in the instant case, an expressed intent to destroy evidence does not clearly show that destruction will occur, then no circumstance will ever fulfill the requirement of a clear showing. As a practical matter, the rule puts newspaper offices, and myriad extensions of the same, absolutely beyond the reach of search warrants. The possibility of making a "clear showing" is a mere mirage which disappears when it is closely examined.

B. Adoption of such a rule will inevitably make innumerable places, besides newspaper offices, effectively immune from service of search warrants. That rule will jeopardize all our freedoms, and must be rejected.

The Fourth Amendment itself imposes no limits on the places which can be searched for evidence. If it is held that the First Amendment makes newspaper offices immune from searches, then other places must also be held immune from searches because they too implicate values protected by the Constitution; *e.g.*, a church, a union office, a political party office (First Amendment), a rifle association office (First and Second Amendments), an attorney's office (Sixth Amendment), a bail bond office (Eighth Amendment), a voter registration office (Fifteenth and Nineteenth Amendments). Conceivably, searches of any of those places could negatively affect constitutional values.

The ultimate ramifications of such a rule are unforeseeable. However, one consequence seems clear. Since all freedoms depend to some extent upon effective law enforcement (*Branzburg v. Hayes, supra*, 408 U.S. at p. 692), those same freedoms will be rendered less secure if law enforcement agencies are deprived of the most effective process for obtaining physical evidence. The Court may be aware of the murderous bombing of the Los Angeles Times newspaper offices by labor union members on October 1, 1910.^{8/} If in

^{8/} Accounts of the bombing, and the subsequent investigation and prosecution of the McNamara brothers, who were defended by Clarence Darrow among others, were reported in many issues of the Los Angeles Times newspaper, most notably those on October 1, 1910, and December 14, 1911. Crucial evidence in that case was obtained by a search of the union's headquarters. See W. W. Robinson, *Bombs and Bribery*, Los Angeles, California (1969).

such a case the freedom of association were held to bar any search of union offices for evidence of crime, law enforcement agencies could be rendered impotent to protect the freedom of the press. Any rule which places our freedoms in such jeopardy should be rejected as unwise.

A rule which effectively makes any place a sanctuary from searches is inconsistent with the historical development of the laws governing search and seizure. The decisions of this Court demonstrate that the nature of the place searched is not dispositive of the legality of a search. *Katz v. United States*, 389 U.S. 347, 19 L.Ed.2d 576, 88 S.Ct. 507 (1967). Thus, notwithstanding the constitutional values reflected in such places, this Court has approved the search of an attorney's office with a warrant (*Andresen v. Maryland*, 427 U.S. 463, 49 L.Ed.2d 627, 96 S.Ct. 2737 (1976)), indicated that a union office may be properly searched with a warrant (*Mancusi v. DeForte*, 392 U.S. 364, 20 L.Ed.2d 1154, 88 S.Ct. 2120 (1968)), and approved a warrantless nonconsensual search of a commercial firearms storeroom (*United States v. Biswell*, 406 U.S. 311, 32 L.Ed.2d 87, 92 S.Ct. 1593 (1972)).

If the prior decisions of this Court are to be accorded due respect, and if law enforcement agencies are to be able to continue effectively to protect our institutions, including the press, the proposed rule must be rejected and the traditional rules upheld.

III

THE COMMON LAW IMMUNITIES APPLICABLE TO PROSECUTORS AND POLICE OFFICERS SHOULD BE APPLIED TO 42 U.S.C. §1988.

The District Court below held that in equitable suits to remedy violations of Fourth Amendment rights of those not suspected of criminal activity an award of attorney's fees as costs was within the court's power and responsibility. *Stanford Daily v. Zurcher*, 366 F.Supp. 18, 24 (N.D. Cal. 1973). In reaching this conclusion the District Court found the defense of qualified immunity to an action for money damages that law enforcement acted in good faith and upon probable cause was not relevant to the award of attorney's fees in an equitable action concerning constitutional rights. 366 F.Supp. 25. The Court granted an award of "reasonable attorney's fees" later determining the amount to be \$47,500. *Stanford Daily v. Zurcher*, 64 F.R.D. 680, 688 (1974).

The Ninth Circuit affirmed the award of attorney's fees in this matter. However, the Ninth Circuit's rationale for the award was not based on the common law or previous court decisions, but on 42 U.S.C. §1988 which had recently been amended (Civil Rights Attorney's Fees Awards Act of 1976, 90 Stat. 2641, October 19, 1976) to include the award of attorney's fees to the prevailing party in civil rights actions. *Stanford Daily v. Zurcher*, 550 F.2d 464, 466 (9th Cir. 1977). The Court rejected the argument that the qualified immunity available to public officials who act in good faith, in damage actions under Section 1983 also insulates them from liability from injunctive or declaratory relief actions (550 F.2d 465). The Ninth Circuit did not discuss whether the qualified immunity

should be applied to an award of attorney's fees under 42 U.S.C. §1988, nor the concept of a prosecutor's absolute immunity in this Court's recent decision in *Imbler v. Pachtman*, 424 U.S. 409, 47 L.Ed.2d 128, 96 S.Ct. 984 (1976).

It is the contention of amici that the awarding of attorney's fees in injunctive or declaratory relief actions emasculates the well reasoned and appropriate rules of absolute immunity for prosecutors set forth in *Imbler v. Pachtman*, *supra*, and qualified immunity set forth in *Pierson v. Ray*, 386 U.S. 547, 18 L.Ed.2d 288, 87 S.Ct. 1213 (1967). The possibility of liability for an award of attorney's fees will undoubtedly have a chilling effect on the exercise of prosecutorial discretion, especially in cases such as the matter at bar in which it is held that a defense of good faith is not available and the prosecutor is not even allowed to show that he was following state law which had been sanctioned by the Legislature and the courts.

The Ninth Circuit accepted the rationale in *Rowley v. McMillan*, 502 F.2d 1326, 1332 (4th Cir. 1974), to support its conclusion that the immunity rule does not apply to injunctive and declaratory relief actions.

Assuming, *arguendo*, that the immunity rules do not apply in injunctive and declaratory relief actions because those actions are designed to prevent *future* illegal action by public officials, the rationale which supports the immunity rules makes them applicable to awards for attorney's fees in actions under 42 U.S.C. §1988. Injunctive and declaratory relief actions usually arise because of some prior action of public officials which is interpreted as an indication of future action which is considered to be a violation of some right by the aggrieved party. Therefore, the ability of the public

official to effectively, efficiently and fearlessly carry out his assigned duties is the basic consideration in any discussion of any type of civil rights action against such public officials.

It is clear that the major rationale behind the immunity rules is that a public official should be free to carry out his duties without the constant fear of damage suits and personal liability for acts done in the course of those duties.

In *Rowley v. McMillan*, *supra*, the case relied on by the Ninth Circuit in rejecting the immunity defense, the Court cites and discusses two United States Supreme Court cases which clearly hold that the rationale behind the immunity rules is to prevent the impact of the fear of personal liability on public officials. In *Barr v. Matteo*, 360 U.S. 564, 3 L.Ed.2d 1434, 79 S.Ct. 1335 (1959), the Court stated:

"The reasons for the recognition of the privilege have been often stated. It has been thought important that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties—suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government." 360 U.S. at p. 571.

This rationale was emphasized again in *Scheuer v. Rhodes*, 416 U.S. 232, 40 L.Ed.2d 90, 94 S.Ct. 1683 (1974):

"The concept of the immunity of government officers from personal liability springs from the same root considerations that generated

the doctrine of sovereign immunity. While the latter doctrine—that the 'King can do no wrong'—did not protect all government officers from personal liability, the common law soon recognized the necessity of permitting officials to perform their official functions free from the threat of suits for personal liability. This official immunity apparently rested, in its genesis, on two mutually dependent rationales: (1) the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion; (2) the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good." 416 U.S. at pp. 239-240 [footnotes omitted].

In *Imbler v. Pachtman*, *supra*, 424 U.S. 409, 47 L.Ed.2d 128, 96 S.Ct. 984, this Court held that a prosecutor has absolute immunity in an action under 42 U.S.C. §1983 for damages for his activities which were an "integral part of the judicial process." The rationale for applying the rule of absolute immunity in *Imbler* appears to be the eradication of the effect on the prosecution and the courts in carrying out their respective duties with the specter of financial damages hanging over the head of the prosecutor. In discussing the effect on the prosecution, the Court states:

"A prosecutor is duty bound to exercise his best judgment both in deciding which suits to bring and in conducting them in court. The public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his

own potential liability in a suit for damages." 424 U.S. at pp. 424-425.

The effect on the courts in reviewing criminal convictions is discussed as follows:

"Various post-trial procedures are available to determine whether an accused has received a fair trial. These procedures include the remedial powers of the trial judge, appellate review, and state and federal post-conviction collateral remedies. In all of these the attention of the reviewing judge or tribunal is focused primarily on whether there was a fair trial under law. This focus should not be blurred by even the subconscious knowledge that a post-trial decision in favor of the accused might result in the prosecutor's being called upon to respond in damages for his error or mistaken judgment." 424 U.S. at p. 427 [footnotes omitted].

It is submitted that an award of attorney's fees in an equitable action such as injunction and declaratory relief would raise the same fears in the prosecutor that an award for civil damages would raise. Whether the awarding of attorney's fees is considered an additional remedy necessary to effectuate the congressional underpinnings of a substantial program (*Stanford Daily v. Zurcher, supra*, 366 F.Supp. 18, 23), or a shifting of the financial burden in order to effectuate a strong congressional policy (*Id.* at p. 25), the public official will only see the possibility of such an award as a threat to his financial security and will act accordingly in carrying out his duties. Therefore, the rationale which this Court has followed in finding both absolute immunity for prosecutors in certain

situations (*Imbler v. Pachtman, supra*) and qualified immunity as to other public officials (*Pierson v. Ray, supra*) should be applied to the award of attorney's fees under 42 U.S.C. §1988 in injunctive or declaratory relief actions under the Civil Rights Act.

Because of a recent decision of the Court of Appeals, a question has arisen as to which of the immunities should be applied to the prosecution in the case at bar. Since an interpretation of that case might influence the ultimate disposition of the present case, i.e., a return to the trial court for a hearing on the good faith of the prosecutor, it is discussed below.

In *Briggs v. Goodwin*, 22 Cr.L. 2001 (D.C. Circuit 9-21-77), the Court emphasized the limited scope of *Imbler v. Pachtman, supra*, and allowed only a qualified immunity to a prosecutor who allegedly lied when called as a witness in a motion to determine if any informants had been included in persons subpoenaed to testify before a federal grand jury.

The Court distinguished between the prosecutor's role as an advocate in which his activities were "intimately associated with the judicial phase of the criminal process" giving him absolute immunity and his function as an administrator or investigative officer in which he enjoys only qualified immunity requiring a showing of a reasonable good faith belief in his actions. The Court in *Briggs, supra*, provided limited guidance in distinguishing between investigative behavior and advocacy. However, other cases cited in *Briggs* assist in classifying the actions of the prosecutor in this case. In *Apton v. Wilson*, 506 F.2d 83, 94 (D.C. Cir. 1974), the Court states:

"There is also room for extension of the 'judicial' immunity approach to the case of executive officials taking action on findings made following administrative adjudication and subjected to appropriate judicial scrutiny." [Footnote omitted.]

In the present case the prosecution chose a procedure which required a presentation of facts to an impartial magistrate who was required to make an independent finding of probable cause and to sanction the search warrant procedure. This certainly subjected the prosecutor's actions to "appropriate judicial scrutiny."

In *McCray v. State of Maryland*, 456 F.2d 1, 5 (4th Cir. 1972), the Court recognizes: "A closely associated defense is afforded all public officers who act in obedience to a judicial order or under the court's direction. . . ."

The action in the present case of conducting the search pursuant to the search warrant would clearly come under this defense.

It is therefore contended that the action of the prosecutor in assisting in obtaining the search warrant was an act of advocacy which was protected by the absolute immunity rule of *Imbler v. Pachtman*, *supra*.^{9/}

Even assuming, *arguendo*, that the action of the prosecution was investigative, he would enjoy the qualified privilege which applies to the police officers who are also subject to the

^{9/} It could also be argued under *McCray v. State of Maryland*, *supra*, that the police officer is protected by the absolute immunity derived from carrying out the orders of the magistrate.

order requiring payment of attorney's fees in this case. Both police and prosecutor under such qualified immunity have a right to present a defense that their actions were made in good faith and in conformance with state law. *Pierson v. Ray*, *supra*, 386 U.S. 547, 557, 18 L.Ed.2d 288, 296, 87 S.Ct. 1213 (1967).

As noted above the District Court found that this defense did not apply to the awarding of attorney's fees. *Stanford Daily v. Zurcher*, *supra*, 366 F.Supp. 18, 25. The Court of Appeals found that the defense did not apply to injunctive or declaratory relief actions and did not address the specific issue of whether it applied to the awarding of attorney's fees in such actions.

It is contended that disallowing a defense of a qualified immunity based on a good faith belief that the public officers are following the law in an award of attorney's fees in an injunctive or declaratory relief action is an unfair and unjust application of the equitable powers of the court and an improper interpretation of 42 U.S.C. §1988. In essence, it leaves the public officer with no defense even though he followed the letter of the law.

A prime example is set forth in the present case in which the police officers and the prosecutor followed California statutory law which authorized the issuance of a search warrant for the type of evidence sought to be seized therein and which had been held to be constitutional. *Collins v. Lean*, 68 Cal. 284, 9 Pac. 173 (1885); *People v. Thayer*, 63 Cal.2d 635, 408 P.2d 108, 47 Cal.Rptr. 780 (1965), cert. denied, 384 U.S. 908, 16 L.Ed.2d 361, 86 S.Ct. 1342 (1966).

There is no finding that the public officers acted in bad faith or with malicious intent. Apparently there was no hearing offered the public officers in that the District Court found the defense irrelevant. Therefore, to penalize them by an award of attorney's fees without consideration of their good faith is an abuse of the court's equitable power and should not be allowed.

The retroactive application of 42 U.S.C. §1988 to the present case is also not warranted. It appears that the Civil Rights Attorney's Fee Act of 1976 was a radical departure from the prevailing common law rule forbidding the awarding of attorney's fees. In a decision prior to the passage of that Act, this Court stated:

"... But the Court has never interpreted §1988 to warrant the award of attorney's fees. And nothing in the legislative history of that statute suggests that such a radical departure from the long-established American rule forbidding the award of attorneys' fees was intended." *Runyon v. McCrary*, 427 U.S. 160, 185, 49 L.Ed.2d 415, 96 S.Ct. 2586 (1976).

If the awarding of attorney's fees in civil rights actions was considered "a radical departure from the long-established American rule forbidding the award of attorneys' fees" by this Court, it can be assumed that the prosecution and police involved herein harbored no fears of such an award when they sought out the magistrate in this action. To punish those officers by retroactive application of the statute would serve no deterrent purpose and would be an unreasonable application of the statute.

The awarding of attorney's fees in this case without consideration or application of the applicable immunity defense will open the door to the awarding of such fees in all cases. If the immunity defense is irrelevant regarding prosecutors and police officers, then it is irrelevant in regard to judges and legislators. No public official is immune from liability for an award of attorney's fees under the theory of the District Court and the Court of Appeals in its application of 42 U.S.C. §1988 in this case. Surely this was not the intent of the Legislature in amending Section 1988 or this Court in its application of the immunity rule.

Finally, the District Court opines that since California state law requires indemnification of public employees for any judgment rendered against them for their actions while performing their duties, the fear of the effects of such an award will not have the adverse effects which concerned this Court in *Pierson v. Ray*, *supra*; *Stanford Daily v. Zurcher*, *supra*, 366 F.Supp. 18, 25.

In California the public entity employing an employee is required to indemnify that employee for a judgment arising out of any claim or action against the employee for actions arising out of the federal Civil Rights Act, whether or not the public employer could be made a party to the suit. California Government Code Section 825;^{10/} *Williams v. Horvath*, 16 Cal.3d 834, 846, 548 P.2d 1125, 129 Cal.Rptr. 453 (1976).

^{10/} "§825. Request for defense or defense by public entity; payment of judgment, compromise or settlement; agreement with employee; reservation of rights

If an employee or former employee of a public entity requests the public entity to defend him against any claim or action against him for an injury arising out of an act or omission occurring within the scope of his employment as an employee of the public entity and such

However, the public employer may refuse to pay a judgment until it is established that the employee's acts were in fact within the scope of employment. California Government Code Section 825; *Williams v. Horvath, supra*, at p. 843. The public employee is thus not relieved of a fear of liability. Not only may he be ultimately liable for attorney's fees, he may also have to finance a lawsuit to force the public employer to recognize his claim. The fear of personal financial loss will still permeate his actions in carrying out his duties.

Further, it does not appear that the issue of whether the California statute applies to an award of attorney's fees has been resolved in this state which could cause the employee further litigation.^{11/} Finally, it is not inconceivable that

Footnote 10 continued

request is made in writing not less than 10 days before the day of trial, and the employee or former employee reasonably cooperates in good faith in the defense of the claim or action, the public entity shall pay any judgment based thereon or any compromise or settlement of the claim or action to which the public entity has agreed.

If the public entity conducts the defense of an employee or former employee against any claim or action with his reasonable good faith cooperation, the public entity shall pay any judgment based thereon or any compromise or settlement of the claim or action to which the public entity has agreed; but, where the public entity conducted such defense pursuant to an agreement with the employee or former employee reserving the rights of the public entity not to pay the judgment, compromise or settlement until it is established that the injury arose out of act or omission occurring within the scope of his employment as an employee of the public entity, the public entity is required to pay the judgment, compromise or settlement only if it established that the injury arose out of an act or omission occurring in the scope of his employment as an employee of the public entity.

Nothing in this section authorizes a public entity to pay such part of a claim or judgment as is for punitive or exemplary damages. (Amended by Stata. 1972, c. 1352, p. 2685, §1.)"

^{11/} Government Code Section 825 precludes indemnification for punitive or exemplary damages.

legislators will amend the indemnification law if it is determined that there is no defense to the award of attorney's fees in civil rights actions against public employees.

The indemnification of a public employee by his employer in California obviously extends to all damages awarded under 42 U.S.C. §1983. If such indemnification is a valid reason to disregard the immunity rules in an award of attorney's fees, it is also a valid reason to do away with such immunity rules in actions for damages. This Court has not so held in its consideration of past cases applying the immunity rules.

It should not do so in this case. Logic and political realities lead to the conclusion that payment of the award of such fees by any political entity will lead to adverse consequences to the public employee whose action caused the granting of the award. Local legislatures are quite concerned about the expenditure of public funds. This concern will be reflected in such areas as the budget of the department in which the offending employees are employed and the consideration of such employees' salaries and fringe benefits. Elected officials will have to face a contention during election time that his department wasted public funds. This can only affect the policy of his department in carrying out their duties to the detriment of the public.

It is submitted that the indemnification of employees is itself an irrelevant consideration when determining whether or not the immunity rule should apply to the award of attorney's fees.

For the reasons stated above, it is respectfully submitted that the Ninth Circuit erred in affirming the award of attorney's fees in this case.

CONCLUSION

The primary responsibility for enforcing and administering criminal law lies with states. Although the rule adopted by the Court of Appeals would have an adverse impact on federal law enforcement, the burden of the rule would weigh more heavily on the states.

The adopted rule flies in the face of the historical development of the Fourth Amendment and ignores the original intent of the amendment which was to balance the right of personal privacy against legitimate interests of society in the apprehension and conviction of criminals.

In Fourth Amendment cases, this Court has engaged traditionally in a process of balancing various competing interests. *United States v. Janis, supra*, 428 U.S. at pp. 447-454; *Stone v. Powell, supra*, 428 U.S. at pp. 487-489. That balancing process is noticeably absent from the opinions of the District Court and the Court of Appeals in the instant case. Indeed, those opinions focus solely upon the rights of the individual, and give no attention to the needs of the greater community.

For our system of justice to survive, the prosecutor must have the latitude to investigate and gather evidence in a timely fashion without the intimidating prospect of future assessments for legal fees arising from his official actions in carrying out the mandate of society. This concept has been recognized by the Court for centuries and for the reasons set forth should not now be cast aside.

Respectfully submitted on behalf of the National District Attorneys Association and the California District Attorneys Association,

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Supreme Court, U. S.
FILED

NOV 17 1977

MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1484

JAMES ZURCHER, et al.,
Petitioners

VS.

THE STANFORD DAILY, et al.,
Respondents

No. 76-1600

LOUIS P. BERGNA, et al.,
Petitioners

VS.

THE STANFORD DAILY, et al.,
Respondents

On Writs of Certiorari to the United States Court of Appeals
for the Ninth Circuit

**BRIEF AMICI CURIAE SUBMITTED BY THE STATES OF ALA-
BAMA, ALASKA, CALIFORNIA, GEORGIA, IDAHO, ILLINOIS,
INDIANA, MARYLAND, MASSACHUSETTS, MISSISSIPPI,
NEBRASKA, NEW HAMPSHIRE, NEW MEXICO, OREGON,
PENNSYLVANIA, UTAH AND VIRGINIA.**

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1484
JAMES ZURCHER, et al.,
Petitioners

VS.

THE STANFORD DAILY, et al.,
Respondents

No. 76-1600
LOUIS P. BERGNA, et al.,
Petitioners

VS.

THE STANFORD DAILY, et al.,
Respondents

On Writs of Certiorari to the United States Court of Appeals
for the Ninth Circuit

BRIEF AMICI CURIAE SUBMITTED BY THE STATES OF ALA-
BAMA, ALASKA, CALIFORNIA, GEORGIA, IDAHO, ILLINOIS,
INDIANA, MARYLAND, MASSACHUSETTS, MISSISSIPPI,
NEBRASKA, NEW HAMPSHIRE, NEW MEXICO, OREGON,
PENNSYLVANIA, UTAH AND VIRGINIA.

This case raises important questions involving the Fourth Amendment and every state's search warrant statutes and rules. In addition the case substantially impairs the immunity from money damages under 42 U.S.C. section 1983 of prosecuting attorneys at both trial and appellate levels. Amici, as the attorneys general of their respective states, have a direct interest in the resolution of these issues.

SUMMARY OF ARGUMENT

Amici argue that a prohibition on the use of search warrants against third parties absent an attempt to use a subpoena duces tecum is without support in the Fourth Amendment. It is also inconsistent with the statutory authority for obtaining and serving warrants in the states, and could greatly reduce the efficiency of the states in enforcing their laws. The fact that a student newspaper was involved in the case does not compel a different result.

Amici also submit that an award of attorney's fees against prosecuting attorneys violates their absolute immunity against money damages under section 1983. In addition, retroactive application of the Civil Rights Attorney's Fees Awards Act of 1976, 90 Stat. 2640 is fundamentally unfair to the prosecutors.

ARGUMENT

I

PROHIBITING THE USE OF SEARCH WARRANTS FOR THIRD PARTIES IS NOT REQUIRED BY THE FOURTH AMENDMENT, IS INCONSISTENT WITH THE SEARCH WARRANT PROVISIONS OF ALL FIFTY STATES, AND UNDERMINES THE ABILITY OF THE STATES EFFECTIVELY TO ENFORCE THEIR LAW.

The district court below left no doubt as to its holding on the question of third-party searches: "law enforcement agencies cannot obtain a warrant to conduct a third-party search unless the magistrate has probable cause to believe that a subpoena duces tecum is impractical." *Stanford Daily v. Zurcher* (N. D. Cal. 1972) 353 F.Supp. 124, 132 adopted on appeal, 550 F.2d 464 (9th Cir. 1977).¹ Any search in violation of this rule is "unreasonable per se, and therefore violative of the Fourth Amendment." *Id.* at 127. Amici submit that this holding is not required by the Fourth Amendment,² and will have a devastating effect on local law enforcement should it be approved by this court.

The purpose of the Fourth Amendment is to protect against "searches under indiscriminate, general authority." *Warden v. Hayden* (1967) 387 U.S. 294,

¹This case involves a student newspaper, but the First Amendment issues discussed in the opinion below are clearly secondary to the major holding set out above. See 353 F.Supp. at 133-135. The secondary issues are discussed later.

²This position was taken by the Sixth Circuit in its rejection of the *Zurcher* holding. *United States v. Mfrs. Nat'l Bank of Detroit, Livernois-Lyndon Street, Safety Deposit Box No. 127, Detroit, Michigan* (6th Cir. 1976) 536 F.2d 699, 702-703, cert. denied, 429 U.S. 1039.

301. Thus the amendment's central concern "is to protect liberty and privacy from arbitrary and oppressive interference by government officials." *United States v. Ortiz* (1975) 422 U.S. 891, 895. This objective has been achieved by the requirement that a neutral and detached magistrate make the determination whether a search warrant should be issued. *Johnson v. United States* (1948) 333 U.S. 10, 13-14.

The Fourth Amendment states clearly the only requirements for a warrant: "... probable cause . . . particularly describing the place to be searched, and the persons or things to be seized." To include the limitation that only "defendants" may be searched with a warrant, as proposed by the court below, is to ignore this Court's admonition to read the Fourth Amendment's "practical" commands in a common sense manner. *United States v. Ventresca* (1965) 380 U.S. 102, 108. By obtaining a search warrant the police insure that the privacy rights of the individual (regardless of whether the person is a defendant, suspect, or third party) are protected. By protecting those rights, the purposes of the Fourth Amendment are achieved. See *Richardson v. State of Maryland* (D. Md. 1975) 398 F.Supp. 425, 429, n. 5. Further procedures are neither necessary nor desirable.

The district court was puzzled by the paucity of authority on this issue. 353 F.Supp. at 127-128. The reason is not, as the district court suggested, that law enforcement agents routinely use the subpoena duces tecum. To the contrary, amici know of no state where law enforcement routinely attempts to obtain

a subpoena in those circumstances. Rather the laws of every state assume the reasonableness of third-party searches.

A review of the various statutory authorizations for search warrants reveals that all states permit property described in the warrant to be seized wherever it is found,³ or provides for the seizure of any evidence tending to show that a felony has been committed or that a particular person has committed it.⁴ The emphasis in each of these statutes is not on the status of the person in whose possession the property may be, but rather it is on the property itself, with consideration for its physical location and its usefulness to the police in proving a crime. These statutes ensure that *every* person is equally guaranteed the protections of the Fourth Amendment. The district court's opinion, if allowed to stand, will effectively invalidate the search warrant provisions of all these states, thus seriously undermining the ability of the states to conduct criminal investigations.

This court recognized in *Fuentes v. Shevin* (1972) 407 U.S. 67, 93, n. 30 that the search warrant serves "a highly important government need—*e.g.*, the apprehension and conviction of criminals. . . ." Even

³See, *e.g.*, ALA. CODE tit. 15, § 199; ALASKA STAT. § 12.35.025; CAL. PEN. CODE § 1524 (West); GA. CODE ANN. § 27-303; IDAHO CODE § 19-4402; IND. CODE ANN. § 35-1-6-1 (Burns); MASS. GEN. LAWS ANN. ch. 276, § 1; MD. ANN. CODE art. 27, § 551; MISS. CODE ANN. § 99-27-15.

⁴See, *e.g.*, CAL. PEN. CODE § 1524 (West); ILL. ANN. STAT. ch. 38, § 108-3 (Smith-Hurd); NEB. REV. STAT. § 29-813; N.H. REV. STAT. ANN. § 595-A:1; N.M. STAT. ANN. § 41-23-17 (Rule 17); OR. REV. STAT. § 133.535; PENN. RULES OF CRIM. PROC. Rule 2002; VA. CODE § 19.2-53.

assuming *arguendo* (as did the district court) that a subpoena could be as easily and quickly obtained as a search warrant,⁵ a subpoena fails to provide the assurances inherent in the warrant process that evidence will not be lost or destroyed.

When a warrant is served, the police seize the described property or evidence and remove it from the premises, precluding the defendant, his associates, his sympathizers, or just the clumsy from tampering with it. The subpoena system set out by the district court requires the police to first ask the third person to turn over the property, thus greatly increasing the opportunity for a suspect either to destroy it or to threaten the person who has it. "The danger is all too obvious that a criminal will destroy or hide evidence or fruits of his crime if given prior notice." *Fuentes, supra*. The criminal will obviously have increased opportunities to tamper under the subpoena/contempt system contemplated by the district court. Though the district court proposed use of contempt proceedings for failure to turn over evidence or the issuance of a restraining order [353 F.Supp. at 133], these procedures will be of little value if the evidence is destroyed, or if the person in whose custody the evidence is ignores, or is prevented from complying with, the restraining order. Though that individual might be jailed for contempt of court or violation of

⁵"[A] search warrant is generally issued in situations demanding prompt action." *Fuentes, supra*. The subpoena-contempt-restraining order procedure proposed below could greatly lengthen the time necessary to obtain evidence, thus slowing investigations and potentially prejudicing suspects who might be cleared by the seized material.

the restraining order, ironically the defendant could go free for lack of sufficient evidence to obtain a conviction.

The district court also concluded that because a student newspaper was the third party in possession of the evidence, First Amendment considerations were present which required the use of a subpoena rather than a warrant, basing its conclusion on *Branzburg v. Hayes* (1972) 408 U.S. 665. See 353 F.Supp. at 133-135. Though it is true that *Branzburg* contains language on the importance of a newsman's sources (408 U.S. at 681-682), the case also makes clear that the First Amendment does not invalidate every incidental burdening of the press that might occur when civil or criminal statutes of general applicability are enforced. 408 U.S. at 682. In *Branzburg* this Court held that a newsman had no First Amendment privilege to refuse to testify before a grand jury about crimes which he saw a source commit. *Id.* at 697. The absence of any attempt at harassment and a compelling interest in law enforcement through grand jury investigations combined to authorize such inquiries. *Id.* at 700. A similar holding is appropriate here. The state has an equally compelling interest in having these photographs of criminal activity brought to light, and use of a warrant, signed by a neutral, detached magistrate insures that the search is not done merely to harass the newspaper. The search in this case was valid under *Branzburg*.⁶

⁶Assuming *arguendo* that *Branzburg* does require different procedures when news agencies are the subject of a search war-

In *Stone v. Powell* (1976) 428 U.S. 465, 490 this Court made the following observation with respect to the exclusionary rule:

"The disparity in particular cases between the error committed by the police officer and the windfall afforded a guilty defendant by application of the rule is contrary to the idea of proportionality that is essential to the concept of justice."

An even greater disparity and windfall will accrue to defendants should the district court's opinion become constitutionally compelled. Amici respectfully submit that the disruption of legitimate, constitutionally permissible law enforcement techniques throughout the country mandates reversal of this case.

II

AN AWARD OF ATTORNEY'S FEES AGAINST PROSECUTORS VIOLATES THEIR ABSOLUTE IMMUNITY FROM MONEY DAMAGES UNDER 42 U.S.C. SECTION 1983.

The Ninth Circuit Court of Appeals affirmed an award of attorney's fees against prosecuting attorneys

rant, amici submit that this Court has already established adequate protections in *United States v. 37 Photographs* (1973) 402 U.S. 363 and *Heller v. New York* (1973) 413 U.S. 483. These cases held that First Amendment concerns with respect to allegedly obscene materials were ensured by a prompt adversary hearing after the seizure. A similar requirement that materials seized from a news agency under a warrant must be quickly reviewed in an adversary hearing to ensure their relevance to a criminal proceeding and that no First Amendment interests are imperiled will suffice to meet the concerns voiced by the court below.

and police officers by retroactively applying the Civil Rights Attorney's Fees Awards Act of 1976 (the Act), 90 Stat. 2640 (October 19, 1976). *Stanford Daily v. Zurcher, supra*, 550 F.2d at 465-466. Amici submit that the granting of attorney's fees violates the prosecutor's immunity against money damages.

This Court has clearly established an absolute immunity from money damages under 42 U.S.C. section 1983 for prosecuting attorneys "in initiating a prosecution and in presenting the State's case. . . ." *Imbler v. Pachtman* (1976) 424 U.S. 409, 431. In reaching this conclusion the Court emphasized the need to ensure that a prosecutor's energies are not deflected from his public duties, and his decisions are not shaded by consideration of possible future litigation. 424 U.S. at 423.

"The public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages." 424 U.S. at 424-425.

An award of attorney's fees seriously erodes the prosecutor's absolute immunity and has the potential for ever greater harm.

Regardless of whether attorney's fees are denominated damages or costs, the effect of such an award is to render the prosecutor liable for an amount of money charged against him due to his performance of some official duty. In many cases the attorney's fees are in excess of the sum of damages. The prosecutor is thus confronted with the need to consider

whether his actions might result, at some future time, in civil rights litigation and exposure to attorney's fees. This abrogates the purpose behind this Court's grant of immunity in *Imbler*. Prosecutors will be hampered in exercising their "best judgment both in deciding which suits to bring and in conducting them in court." *Imbler* at 424.

Moreover, an award of attorney's fees poses even greater problems from the standpoint of its effect on a prosecutor's performance of his duties than does an award of damages. In its decision granting attorney's fees, the district court in this case specifically found that a good faith defense was no bar to the award of such fees. *Stanford Daily v. Zurcher* (N.D. Cal. 1973) 366 F.Supp. 18, 25.¹ The theory presented was a shifting of the financial burden of litigation, rather than punishment of the persons charged with the fees. As a result prosecuting attorneys who cannot be sued at all, "even when their acts are alleged to be malicious" [*Harris v. Harvey* (E.D. Wis. 1976) 419 F.Supp. 30, 31], can be forced to pay attorney's fees for the good faith performance of their job. Such a result is particularly untoward and unfair in a case such as this, where the prosecutor met his constitutional and statutory obligations and obtained an opinion from a neutral, detached magistrate that the search proposed was fully proper. Nevertheless this careful and conscientious prosecutor must pay attorney's fees because another judge decided, on an en-

¹The Ninth Circuit did not deal with this issue, but merely upheld the award by application of the Act.

tirely new interpretation of the Fourth Amendment, that the first judge should not have issued the warrant. The impact of this decision is manifest. Not only has the prosecutor lost a considerable portion of the immunity granted by *Imbler*, he has no defense to the imposition of damages in the guise of attorney's fees, and is the insurer of judicial error.²

The district court attempted to minimize this argument by noting that in California the public entity would pay any fees under that state's statutory scheme of indemnification, 366 F.Supp. at 25-26. But the decision by a state to provide indemnification for its employees is irrelevant. The crucial question is, does a federal court have the jurisdiction to make the attorney's fees award, and then order that a state entity pay it.

A state entity may not be sued directly since it is not a person under section 1983. *Monroe v. Pape* (1961) 365 U.S. 167; *Moor v. County of Alameda* (1973) 411 U.S. 693.³ It cannot ever be a party and thus is at least as immune as is the prosecuting attorney. Since the employer is immune, a federal court

²Police officers are placed in an equally untenable situation by the decision below. The officers here were obligated to serve the search warrant, duly issued by a magistrate and not defective on its face. Refusal could result in the loss of their jobs or contempt of court citations. By serving it, however, they now face the possibility of an award of damages in the form of attorney's fees against them, for which they have no defense.

³Congress did not change this rule when it passed the attorney's fees act. Legislation has recently been introduced to include state government units in the definition of persons under section 1983 (H.R. 4514, introduced March 4, 1977), a step that would be unnecessary if the Act overruled or modified *Monroe* and *Moor*.

cannot order that the government entity pay an award of attorney's fees. The fact that a state has chosen to indemnify its employees in other contexts and with other objectives in mind does not compel a different conclusion. *

The existence of indemnification does not authorize a court to make an otherwise improper award of money merely because there is a fund available to pay that award. The logic of the district court would prohibit an attorney's fees award against prosecuting attorneys in states without indemnification, while permitting it in states with indemnification, a clearly inequitable result.¹⁰ Amici submit that the Act can never be used to authorize an award of attorney's fees against prosecutors, since the attorney should never be liable, and the government entity which would pay the award cannot be sued at all.

Should this Court decide, however, that the Act does permit attorney's fees awards in cases such as this, amici submit that it is inappropriate to do so retroactively. Though it appears that Congress intended the Act to apply to all cases pending on the date of enactment (550 F.2d at 466), consideration

¹⁰Amici note that indemnification of public employees is not universally accepted by the states. Indeed, a survey conducted by the American Correctional Association in 1977 found that seventeen states have no provisions for indemnification. R. Crane and G. Roberts, *Legal Representation and Financial Indemnification for State Employees: A Study* (January, 1977) (American Corrections Association). A chart prepared for the study which sets out the states and their indemnification provisions is reproduced as Appendix A to this brief. The fact that some states have adopted such a procedure should not authorize a federal court to impose that obligation on other states.

should still be given to the factors set out by this Court in *Bradley v. Richmond School Board* (1974) 416 U.S. 696, 717-718 (cited in the House report, 550 F.2d at 466): the nature and identity of the parties, the nature of their rights, and the nature of the impact of the change in law on those rights. All of these factors are applicable in this case, and as a result the municipality and the prosecutor are unfairly and unjustly precluded from protecting themselves from an award of attorney's fees on a theory not available at the time of the incident, or when the award was made. Amici submit that the Ninth Circuit erred in applying the attorney's fees act retroactively.

CONCLUSION

For the foregoing reasons amici respectfully submit that the judgment of the United States Court of Appeals for the Ninth Circuit should be reversed.

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APPENDIX

November 15, 1977.

(Appendix A Follows)

APPENDIX A

<u>State</u>	<u>Legal Assistance</u>	<u>Indemnification</u>	<u>Comments</u>
Alabama	Yes	No	
Alaska	Yes	Yes	Limit: \$100,000,000.
Arizona	Yes	No	
Arkansas	Yes	No	
California	Yes	Yes	Punitive damages not covered
Colorado	Yes	Yes	Covers tort and §1983
Connecticut	Yes	Yes	Immunity law
Delaware	Yes	No	Bills in drafting stage
Florida	Yes	Yes	
Georgia	Yes	No	
Hawaii	Yes	No	Provided by collective bargaining agreement
Idaho	Yes	Yes	
Illinois	Yes		
Indiana	Yes	No	
Iowa	Yes	Yes	Bill passed in 1975
Kansas	Yes	No	
Kentucky	Yes	No	
Louisiana	Yes	Yes	Indemnification limited to §1983 actions
Maine	Yes	Yes	Ad hoc determination
Maryland	Yes	No	But may apply to Board of Public Works for help
Massachusetts	Yes	Yes	Limited to \$10,000
Michigan	Yes	Yes	Not required to indemnify
Minnesota	Yes	No	Limited to tort actions
Mississippi	Yes	No	
Missouri	Yes	Yes	Limited to \$100,000
Montana	Yes	Yes	
Nebraska	Yes	Yes	Ad hoc determination
Nevada	Yes	Yes	
New Hampshire	Yes	Yes	Broad protection given
New Jersey	Yes	Yes	No punitive damages
New Mexico	Yes	Yes	
New York	Yes	Yes	
North Carolina	Yes	Yes	Limited to \$30,000
North Dakota	Yes	Yes	Bonding fund
Ohio	Yes	No	

APPENDIX A (continued)

<u>State</u>	<u>Legal Assistance</u>	<u>Indemnification</u>	<u>Comments</u>
Oklahoma	Yes	No	Limited to civil and civil rights actions
Oregon	Yes	Yes	
Pennsylvania	Yes	Yes	Legal help usually not provided in criminal cases
Rhode Island	Yes	Yes	Decided on case by case basis
South Carolina	Yes	Yes	Limited to \$350,000
South Dakota	Yes	No	Provides up to \$3,000 for legal assistance
Tennessee	Yes	No	
Texas	Yes	Yes	Bill enacted in 1975
Utah	Yes	Yes	
Vermont	Yes	Yes	Indemnification limited to \$100,000 and discretionary
Virginia	Yes	Yes	
Washington	Yes	Yes	
West Virginia	Yes	No	
Wisconsin	Yes	Yes	Indemnification limited to \$100,000
Wyoming	Yes	Yes	Limited to \$250,000
Canada	Yes	Yes	

DEC 14 1977

MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States

October Term 1977

Nos. 76-1484, 76-1600

JAMES ZURCHER, et al., *Petitioners*,
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 THE STANFORD DAILY, et al., *Respondents*.

LOUIS P. BERGNA, et al., *Petitioners*,
 v.
 THE STANFORD DAILY, et al., *Respondents*.

**BRIEF OF THE NATIONAL ASSOCIATION OF
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 IN SUPPORT OF THE POSITION OF RESPONDENTS**

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IN THE Supreme Court of the United States

October Term 1977

Nos. 76-1484, 76-1600

JAMES ZURCHER, et al., *Petitioners*,
v.
THE STANFORD DAILY, et al., *Respondents*.

LOUIS P. BERGNA, et al., *Petitioners*,
v.
THE STANFORD DAILY, et al., *Respondents*.

BRIEF OF THE NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS, INC., AMICUS CURIAE,
IN SUPPORT OF THE POSITION OF RESPONDENTS

Interest of Amicus

The National Association of Criminal Defense Lawyers, Inc. is a District of Columbia non-profit corporation whose membership is comprised of approximately 1600 lawyers who are citizens of every State in the Union and

all of whom are primarily engaged in positions bringing them into daily contact with the Criminal Justice System either as advocates, law professors or judges of the state and federal courts. Among its stated objectives is to promote the proper administration of criminal justice and to thereby concern itself with the protection of individual rights and the improvement of criminal law, its practices and procedures. This Brief is tendered in the discharge of that organizational objective. It is filed with consent of all parties as is evidenced by written consent of all parties in compliance with United States Supreme Court Rule 42 filed concurrently herewith with the Clerk of this Court.

Amicus believes that the scope of the question involving the issuance of a search warrant authorizing seizure from a non-suspect, innocent third party of evidence which is neither contraband nor the fruits or instrumentality of a crime and which inevitably interferes with a law abiding citizen's trust in government and rights of privacy necessarily implicates issues of special concern to Amicus. This is particularly true when considered in light of the historical role of counsel in representing persons who have been served with subpoena to appear as witnesses before grand juries or who have been contacted by government investigators for purposes of obtaining evidence or investigative leads. This Brief is limited only to such issues.

Amicus supports the Respondents' prayer that the judgment of the courts below be affirmed but proposes a somewhat different rationale than was expressed in those opinions.

ARGUMENT

SEARCHES OF THIRD PARTY NON-SUSPECTS, PURSUANT TO A WARRANT, FOR TANGIBLE OBJECTS WHICH ARE NEITHER INHERENTLY ILLEGAL NOR THE FRUITS OR INSTRUMENTALITIES OF A CRIME ARE UNREASONABLE, ABSENT AN AFFIRMATIVE SHOWING, UNDER OATH, TO THE ISSUING MAGISTRATE, THAT EXIGENCIES RENDER LESS INTRUSIVE MEANS OF OBTAINING THE OBJECTS IMPRACTICAL.

A. Probable Cause Not In Issue

For purposes of expressing the position of Amicus, it is not necessary to contest the existence in the case *sub judice* of sufficient allegations in the affidavit pursuant to which the instant search warrant issued and upon which the magistrate could have found "probable cause" in its traditional sense. Amicus believes that *Warden v. Hayden*, 387 U.S. 294, 18 L.Ed.2d 782 (1967), established the procedure which must be adhered to by a magistrate where authority for a search for things innocent in themselves is being sought. There the Court stated:

The requirements of the Fourth Amendment can secure the same protection of privacy whether the search is for 'mere evidence' or for fruits, instrumentalities or contraband. There must, of course, be a nexus—automatically provided in the case of fruits, instrumentalities or contraband—between the item to be seized and criminal behavior. Thus in the case of 'mere evidence,' probable cause must be examined in terms of cause to believe that the evidence sought will aid in a particular apprehension or

conviction. *In so doing, consideration of police purposes will be required.* Cf. *Kremen v. United States*, 353 U.S. 346, 1 L.Ed.2d 876, 77 S. Ct. 828. *Warden v. Hayden*, supra, 387 U.S. at 306-307. (emphasis added)

The instant case presents this Court with its first opportunity to examine the "reasonableness" of the search of a third party for "mere evidence" where the problem of standing is not a barrier. See *Alderman v. United States*, 394 U.S. 165, 89 S.Ct. 961, 22 L.Ed.2d 176 (1969). While any attempt to assess a reason for this is inherently speculative due to the lack of empirical data, historically police and prosecutors have always either requested such materials informally or had a grand jury or court issue a subpoena duces tecum and served it upon the subject. An examination of recent case law indicates that the procedure used in the instant case is gaining in popularity in the context of seizures of persons or property. See *People ex rel Carey v. Covelli*, 61 Ill. 2d 394, 336 N.E.2d 759 (1975), *United States v. Manufacturers National Bank of Detroit, Livernois-Lyndon Streets, Safety Deposit Box #127, Detroit, Michigan*, 536 F.2d 699 (6th Cir., 1976); see also, *J.E.G. v. C.J.E.*, 360 N.E.2d 1030 (Ind. App., 1977), *State v. Klinker*, 85 Wash. 2d 520, 537 P.2d 268 (1975), *Bacon v. United States*, 449 F.2d 933 (9th Cir., 1971).

Amicus only concern in this case is the Fourth Amendment aspect. To determine the Fourth Amendment issue in this case will require a balancing of the individual's right of privacy and security in the sense best expressed in *Katz v. United States*, 389 U.S. 347, 19 L.Ed.2d 576, 88 S.Ct. 507 (1967), against the valid law enforcement objectives of apprehending and prosecuting those believed

guilty of criminal conduct. However, traditional approaches as announced by prior decisions of this Court can be only tangentially helpful because of the novelty of considering the rights under the Fourth Amendment as presented by an innocent person. Thus, while the standard must be "reasonableness" of the search, a consideration of each "third party - mere evidence" case on its own facts and circumstances as mandated by *Gro-Bart Importing Company v. United States*, 282 U.S. 344, 51 S.Ct. 153, 75 L.Ed. 374 (1931), requires more than just an examination of probable cause. What must be decided is whether the decision to interrupt and invade the sanctuary of Fourth Amendment protected privacy is left to the unbridled discretion of the police once they can establish to a magistrate that probable cause exists to believe that a non-suspect has tangible objects which will aid them in apprehending or convicting someone. Or to state it differently, can the magistrate require more than this showing before issuing the warrant where a non-suspect is the target—i.e. does he have the authority to refuse to issue a warrant in these situations in which a less intrusive means has not been demonstrated to be unavailable?

This Court has examined cases in the past in which it has held that even though probable cause existed and the search warrant was valid, the search was "unreasonable", but Amicus recognizes that these have been cases in which the Court has been sitting in its role as final arbiter of the Federal Rules of Criminal Procedure. See *Sgro v. United States*, 287 U.S. 206, 53 S.Ct. 138, 77 L.Ed. 260 (1932). However, the evolution of the Fourth Amendment has occurred almost entirely within the framework of the review by this Court of criminal cases, and yet

this Court has never held that “reasonableness” and “probable cause” are synonymous. It is respectfully submitted by Amicus that they are not, and that the case *sub judice* presents a good vehicle for announcing it. Affirming the judgment below will also go a long way toward reaffirming the “popular trust in government” which is at the very foundation of our democracy and giving meaning to the concept that the Chief Justice has recognized as a necessity to “protect *innocent* persons aggrieved by police misconduct”. (emphasis added) *Stone v. Powell*, 428 U.S. 465, 500, 49 L.Ed.2d 1067, 1091 (1976); see also, *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 411-427, 91 S.Ct. 1999, 20 L.Ed.2d 619 (1971).

B. Historic Use Of Subpoenae In Third Party Cases Is Indicative Of The Intent Of The Framers Vis-A-Vis The Fourth Amendment

The parties to the case *sub judice* have conducted exhaustive research into the issue involving third party searches and have informed this Court and the courts below of the dearth of available precedent. As a “friend of the Court”, Amicus suggests that the historical absence of the use of a search warrant in such cases is of great significance. It is to be noted that the timing of the adoption of the Bill of Rights was greatly (perhaps primarily) affected by the concern over the delay of the States of Virginia, Rhode Island, New York, North Carolina and New Hampshire in ratifying the Constitution. Richard Henry Lee of Virginia, one of the most distinguished and influential opponents of the Constitution, was quite vocal in articulating his belief that a Bill of Rights was needed before Virginia would ratify. In his

Letters from the Federal Farmer to the Republican, he wrote on October 8, 1787:

. . . [W]hen we are making a constitution, it is to be hoped, for ages and millions yet unborn . . . [t]here are other essential rights (besides freedom of religion) which we have justly understood to be the rights of free men—as freedom from hasty and unreasonable search warrants, warrants not founded on oath and not issued with due caution . . .

Pamphlets on the Constitution of the United States, Published During Its Discussion by the People, 1787-1788. (Edited by Paul L. Ford. Brooklyn, 1888.)

Lee’s concern for warrants being issued too hastily reflects not only the intent of the framers of the Bill of Rights when considering the problems to which the Fourth Amendment was directed, but also is indicative of why, from the outset, the unarticulated basis for the use of the subpoena process has been that a search warrant would be too intrusive, not that probable cause is absent. Although the petitioners and their amici argue that the choice is solely a discretionary one for the law enforcement agency to make, to state the premise is to compel its rejection. Valid privacy interests of law abiding citizens could never be safe-guarded by such a gossamer shield. There is no room for such arbitrariness in Fourth Amendment jurisprudence. The right of personal security and privacy is one’s own lawful affairs, as it has been historically perceived and enjoyed, would be rent and cast asunder were this Court even to imply that such discretion was possessed by the prosecution function.

Of course, in most cases law enforcement investigators will informally request a third party, non-suspect’s co-

operation and voluntary submission of statements or tangible objects helpful to their cause when the existence of such becomes known. In other cases, particularly when a grand jury investigation is in progress, a subpoena will be served upon the third party requesting whatever tangible objects are desired by the grand jury. Amicus does not argue with the fact that there are circumstances under which a search warrant would be necessary and reasonable *ab initio*, for it would require blindness to the realities of life to say the contrary. However, such a decision should be made by the issuing magistrate if we as a nation are to continue to respect individual privacy rights and the sense of national well-being which flows therefrom. Any contrary inference which could be taken from this Court's opinion in this case will necessarily be a message to every law-abiding person in America that he possesses even the most innocuous books, papers and tangible objects at his own risk, and has no reasonable expectation of privacy in his own home or office. The previous statement by this Court that "The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society" will be merely empty words. *Wolf v. Colorado*, 338 U.S. 25, 69 S.Ct. 1359 (1949). It is difficult to conjure up a situation which could be more arbitrary.

C. The Prior Determination Of Reasonableness Will Not Overburden The Prosecution And Will Provide Protection For Privacy Rights Of The Law Abiding

This Court is not required to mandate that a state utilize a grand jury procedure and all of the incidentals

thereto as practiced in the federal system whenever such a problem as occurred in this case arises. However, the precise procedure to be utilized can be left to the state to determine, once this Court declares that the Fourth Amendment is not satisfied by a procedure such as that employed in the instant case. Such a position was taken by this Court in the case of *Gerstein v. Pugh*, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975), and it would seem to Amicus that the same approach would be in order in the instant case. While the Court need not declare by its opinion that third parties do not always have to be afforded those rights and privileges which we have come to assume in federal grand jury investigations, for example, advice of counsel, common law testimonial privileges, etc., it can certainly declare that the minimum standard of "reasonableness" applies to third parties as well as suspects where a search warrant is involved. And it can also enunciate the tests which will be applied to determine if the standard has been met.

Amicus submits that the tests must be much more stringent when the prosecutor is seeking the warrant as opposed to the grand jury seeking a piece of evidence pursuant to a subpoena, based not only upon the nature of the intrusion, but also upon the breadth allowed to the the grand jury's investigations. See generally, *United States v. Calandra*, 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974), *United States v. Morton Salt*, 338 U.S. 632, 70 S.Ct. 357, 94 L.Ed. 401 (1951), *Oklahoma Press Publishing Company v. Walling*, 327 U.S. 186, 66 S.Ct. 494, 90 L.Ed. 614 (1946).

The protection to the right of privacy provided by the Fourth Amendment should only give way in a third party

"mere evidence" situation in which the evidence is likely to be destroyed, secreted or removed from the jurisdiction. *Cf. Ker v. California*, 374 U.S. 23, 37-41, 10 L.Ed.2d 726, 740-742; *see also, Katz v. United States*, *supra*, 389 U.S. 347, 355 (fn. 16). While this state of affairs can reasonably be presumed when the possessor or custodian and the suspected offender have some articulable identity or alliance, it should nevertheless be incumbent upon the seeker of the warrant to demonstrate that the possessor-custodian is likely to destroy, secrete or remove the evidence if the subpoena procedure is used prior to a warrant. Without such a showing, any search, even based upon probable cause, is unreasonable in third party situations.

As mentioned earlier in this brief, Amicus does not believe that the United States District Court or the United States Court of Appeals rulings as to probable cause requiring such a showing were necessarily correct. This Court does not have to add another element to the quantum of probable cause considerations to resolve this case. However, "reasonableness" in its traditional Fourth Amendment applications certainly has acquired a different meaning when the search warrant procedure is being used against a third party who ordinarily would be served with a subpoena. Amicus suggests to this Court that the test of "reasonableness" in such cases should be administered by the magistrate at the time of application for the warrant. Any such application should contain, under oath, sufficient facts for the magistrate to determine that the person for whom the authority to search is sought bears a relationship with a criminal suspect (not necessarily identified) which would suggest a manifest probability that the evidence will be destroyed, secreted or

removed from the jurisdiction. To do otherwise would result in a presumption that an innocent person should not be trusted to obey the law.

CONCLUSION

The poorest man in his cottage may bid defiance to all the forces of the Crown. It may be frail, its roof may shake, the wind may blow through it, the storm may enter, the rain may enter, but the King of England cannot enter. All his forces dare not cross the threshold of the ruined tenements.

William Pitt the Elder, c. 1750

Amicus suggests that Pitt's concept has particular application to a law-abiding citizen who is believed by law enforcement to have "mere evidence" of a crime in his possession. Such protection against the arbitrary use of a search warrant instead of a subpoena or some other less intrusive means is an American birthright and an essential ingredient to peace of mind for all law-abiding people. We fought a war with England for it; our history dictates that it has been silently honored as inviolate since then, and we should not discard it in the absence of a strong, demonstrated necessity made under penalty of perjury.

The judgment should be affirmed.

Respectfully submitted,

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BOOK ARGUMENT

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Supreme Court, U. S.
FILED

IN THE
Supreme Court of the United States

DEC 17 1977

OCTOBER TERM, 1977

MICHAEL RODAK, JR., CLERK

Nos. 76-1484, 76-1600

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THE STANFORD DAILY, *et al.*,
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v. *Petitioners*,
THE STANFORD DAILY, *et al.*,
Respondents.

On Writs of Certiorari to the United States
Court of Appeals for the Ninth Circuit

BRIEF FOR AMICI CURIAE

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THE NATIONAL NEWSPAPER ASSOCIATION	THE NEWSPAPER GUILD (AFL-CIO)
THE NATIONAL ASSOCIATION OF BROADCASTERS	THE AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS (AFL-CIO)
THE AMERICAN SOCIETY OF NEWSPAPER EDITORS	THE CALIFORNIA NEWSPAPER PUBLISHERS ASSOCIATION
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1977

Nos. 76-1484, 76-1600

JAMES ZURCHER, et al.,
v. Petitioners,THE STANFORD DAILY, et al.,
Respondents.LOUIS P. BERGNA, et al.,
v. Petitioners,THE STANFORD DAILY, et al.,
Respondents.On Writs of Certiorari to the United States
Court of Appeals for the Ninth Circuit

BRIEF FOR AMICI CURIAE

THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS	THE STUDENT PRESS LAW CENTER
THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION	THE SOCIETY OF PROFESSIONAL JOURNALISTS (SIGMA DELTA CHI)
THE NATIONAL NEWSPAPER ASSOCIATION	THE NEWSPAPER GUILD (AFL-CIO)
THE NATIONAL ASSOCIATION OF BROADCASTERS	THE AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS (AFL-CIO)
THE AMERICAN SOCIETY OF NEWSPAPER EDITORS	THE CALIFORNIA NEWSPAPER PUBLISHERS ASSOCIATION
THE ASSOCIATED PRESS MANAGING EDITORS	
THE RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION	

QUESTIONS PRESENTED

1. Whether the First Amendment permits police officers to perform a surprise search of a news organization's offices, without notice or opportunity to raise a judicial challenge, where there is no showing that the news organization is involved in criminal activity or is likely to destroy evidence in its possession.

2. Whether the Civil Rights Attorney's Fees Awards Act of 1976 authorizes an award of fees to a news organization that has successfully vindicated its First Amendment rights in a suit under 42 U.S.C. § 1983.

INTEREST OF AMICI CURIAE

This Brief Amicus Curiae is submitted with the consent of the parties by:

The Reporters Committee for
Freedom of the Press

The American Newspaper Publishers
Association

The National Newspaper Association

The National Association of
Broadcasters

The American Society of Newspaper
Editors

The Associated Press Managing
Editors

The Radio-Television News Directors
Association

The Student Press Law Center

The Society of Professional Journalists
(Sigma Delta Chi)

The Newspaper Guild (AFL-CIO)

The American Federation of Television
and Radio Artists (AFL-CIO)

The California Newspaper Publishers
Association

The Reporters Committee for Freedom of the Press is a legal research and defense fund organization established to protect the First Amendment interests of the working press. Its members include news reporters active in both the written and broadcast media.

The American Newspaper Publishers Association ("ANPA") is a nonprofit membership corporation, whose more than 1,250 member newspapers constitute over 90 percent of the total daily and Sunday newspaper circulation, and a significant portion of the weekly newspaper circulation, in the United States. Concerned with issues of general significance to the profession of journalism and the newspaper publishing business, ANPA seeks to keep its members informed of, and to provide meaningful input on, matters touching on these concerns. In that regard, the Association's member newspapers, individually and through the ANPA, seek both to protect the public's right under the First Amendment to information concerning the activities of government and matters of public interest, and to maintain the primary function of newspapers: the gathering of information for dissemination to the people.

The National Newspaper Association is a national organization of 6,500 newspapers with members in all 50 states. Its purpose is to preserve the constitutional guarantee of freedom of the press.

The National Association of Broadcasters is a nonprofit, incorporated association of radio and television broadcast stations and networks. As of December 2,

1977, NAB's membership included 2504 AM radio stations, 1857 FM radio stations, 548 television stations, and all nationwide commercial broadcast networks. The object of NAB, according to its by-laws:

"... shall be to foster and promote the development of the arts of aural and visual broadcasting in all its forms; to protect its members in every lawful and proper manner from injustices and unjust exactions; to do all things necessary and proper to encourage and promote customs and practices which will strengthen and maintain the broadcasting industry to the end that it may best serve the public."

Among NAB's primary concerns is maintaining the vitality of the First Amendment guarantee of "freedom of the press."

The American Society of Newspaper Editors is a nationwide professional organization of more than 800 persons who are directing editors of daily newspapers throughout the United States. The purposes of the Society, which was founded more than 50 years ago, include the maintenance of the "dignity and rights of the profession."

The Associated Press Managing Editors is an organization of 600 editors of newspapers affiliated with the Associated Press, which is the largest news collection organization in the world and is cooperatively owned by its member newspapers. It is extremely interested in First Amendment problems and has been active in many ways to further the news-gathering interest of the press.

The Radio-Television News Directors Association is a nonprofit professional organization of journalists. It includes approximately 1,300 members who are active in the supervision, reporting, and editing of news and other information broadcast by the national networks and by local radio and television stations throughout the United States.

The Student Press Law Center is the only national organization devoted exclusively to protecting the First Amendment rights of the nation's high school and college press. The Center, which is cosponsored by the Reporters Committee and the Robert F. Kennedy Memorial, provides direct legal assistance to high school and college students suffering First Amendment violations. The Center also serves as a national clearinghouse to collect and distribute information on the First Amendment rights of the student press.

The Newspaper Guild ("TNG") is an international labor organization, affiliated with the AFL-CIO and the Canadian Labour Congress, that represents some 40,000 persons employed principally by newspapers, magazines, and broadcasting companies in the United States, Canada, and Puerto Rico. TNG has been and continues to be actively involved and interested in protecting and preserving the First Amendment rights of its members.

The American Federation of Television and Radio Artists, AFL-CIO, is a labor union with a membership of 30,000, including all radio and television network news correspondents and reporters and the vast majority of correspondents and reporters employed at local radio and television stations in the United States. This union has long engaged in efforts to secure the efficacy and service of electronic journalism against inroads on First Amendment rights and the right of the people to see and hear the news.

The Society of Professional Journalists (Sigma Delta Chi) is the largest, oldest, and most representative organization serving the field of journalism. It has 27,000 professional members in print and broadcast journalism and the teaching of journalism and another 7,000 campus members. The society's objective is "to work to safeguard the flow of information from all sources to the

public so that it has access to the truths required to make democracy function and to protect our freedoms."

The California Newspaper Publishers Association is an organization of 454 daily and weekly newspapers of general circulation. Founded in 1927, the association has long been interested in First Amendment and freedom of information problems as they relate to the press and has been active in both the legislature and the courts in these areas.

Amici have a vital interest in the resolution of the question whether the First Amendment protects news organizations against surprise searches that would seriously hinder their function of gathering and disseminating the news. Amici also have a vital interest in the availability of attorneys' fees awards to members of the press who successfully sue under 42 U.S.C. § 1983 to vindicate their rights under the First, Fourth, and Fourteenth Amendments.

STATEMENT OF FACTS

The facts, stated more fully in respondents' brief, are as follows:

In April 1971, a political sit-in demonstration occurred at the Stanford University Hospital in Palo Alto. The *Stanford Daily*, an independent student-published newspaper, had reporters and photographers at the sit-in, during which several police officers allegedly were assaulted in a scuffle with the demonstrators.

Several days later, without notice to or prior demand on the newspaper, police officers appeared at the newspaper's offices with a search warrant issued by the local municipal court. The police had explained to the issuing judge that the reason for the search was that they believed the newspaper possessed unpublished photographs that would be helpful in identifying persons who allegedly caused the disorders at the hospital.

There was no claim that any of the newspaper's staff participated in the disorders. Nor was there any claim that the *Daily* would destroy the photographs if the police sought them by subpoena instead of by a surprise search. And there was no claim that the police had tried to identify the troublemakers by questioning or arranging for subpoenas to be served on the dozens of non-press witnesses, demonstrators, and hospital employees at the scene.

The police entered the newspaper's offices and examined the contents of filing cabinets, desks, shelves, and wastebaskets. They inspected reporters' confidential notes, unpublished film, and other internal newsroom information, some of which had been received in confidence and involved news stories unrelated to the hospital incident.

The search did not produce the unpublished photos sought by the police. The *Stanford Daily* then filed this action for declaratory and injunctive relief.

The courts below held that the search of the *Daily's* offices was invalid under the First and Fourth Amendments. They ruled that the police must give a news organization notice, through a subpoena, and an opportunity to litigate the request, before compelling the disclosure of confidential materials. And the courts awarded the plaintiffs \$47,000 in attorneys' fees.

The law enforcement officers sought review in this Court, which granted certiorari.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case is of extreme importance to the press and all of us who benefit from freedom of the press. This Court has been asked to rule that law enforcement officials armed with *ex parte* search warrants may per-

form surprise searches of news media not suspected of any crime, without notice or opportunity to raise a judicial challenge. The Court is asked to permit law enforcement officials to rifle through desks, files, unpublished photos, confidential notes and internal correspondence, and other news-gathering material protected by the First Amendment in a search for any item specified in a warrant, without the procedural guarantees that the First Amendment requires.

The press in this case is not arguing that it has an absolute privilege to withhold information. It is seeking the modest assurance that law enforcement officers demanding news-gathering material from a news organization, not suspected of any crime, follow procedures that give advance notice of the effort to seize the information and an opportunity to appear in court to contest the seizure on both First Amendment and other grounds.

The power to perform surprise searches of news offices, if confirmed, would deprive the press of any opportunity to have its First Amendment interests balanced against asserted law enforcement needs—an opportunity required by *Branzburg v. Hayes*, 408 U.S. 665 (1972)—because law enforcement officers would already have seen or seized the protected material. Such searches would severely impair the ability of the press to gather and disseminate news, and physically disrupt its operations. This Court's decisions make clear that such an intrusion on First Amendment interests will not be tolerated, where, as here, law enforcement officers can accomplish their purposes through less intrusive procedures allowing notice and opportunity for a hearing.

Moreover, surprise searches of news offices thwart the statutory protections expressly made available to the press by reporters' privilege laws in California and 25 other states. Many of these laws were passed in direct response to this Court's suggestion in *Branzburg v.*

Hayes, *supra*, 408 U.S. at 706 (1972), that appropriate protection for confidential press sources could be fashioned by legislation. These "shield" laws generally protect the press against forced disclosure of confidential information when the information is sought by subpoena. Neither the *Branzburg* Court nor the state legislatures conceived of the possibility that such laws could be evaded by resort to a search warrant, enabling the police to descend on news offices without notice, to seize confidential information, and thus to destroy any opportunity for the invocation of state shield laws or any other constitutional protection against compelled disclosure.

The second question in this case is equally important. As Mr. Justice Brennan observed in his concurring opinion in *Nebraska Press Association v. Stuart*, 427 U.S. 539, 608 n.35 (1976), the legal costs involved in litigating First Amendment cases can be considerable, and even prohibitive, for a small publisher.¹

Congress had this problem in mind when it passed the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988. Congress passed that Act because of its concern that persons with limited financial resources would hesitate to vindicate their federal constitutional rights unless they were given some possibility of being made whole again if their claims prevailed. Indeed, the award of fees to the *Stanford Daily* in this very case was mentioned approvingly in the legislative history of the Act, making it clear that Congress intended to include the press among those encouraged to vindicate constitutional rights through litigation. Petitioners' attack on the attorneys' fees award is entirely foreclosed by the Act and its legislative history.

¹ The costs to the press association of litigating that case exceeded \$100,000, far beyond its ability to pay. See Appendix A to this Brief.

ARGUMENT

I. THE COURTS BELOW CORRECTLY HELD THAT THE SEARCH OF THE *STANFORD DAILY'S* OFFICES WAS INVALID ABSENT OPPORTUNITY FOR A PRIOR ADVERSARY HEARING.

In *Branzburg v. Hayes*, 408 U.S. 665 (1972), this Court declined to establish an absolute privilege for newsmen generally to withhold information that is lawfully sought by a grand jury. The Court noted the deep-seated historical reluctance of the courts to create new testimonial privileges. It observed that

"the common law recognized no such privilege, and the constitutional argument was not even asserted until 1958. From the beginning of our country, the press has operated without constitutional protection for press informants, and the press has flourished. The existing constitutional rules have not been a serious obstacle to either the development or retention of confidential news sources by the press."²

In marked contrast, the surprise search of press offices that occurred in this case has no such historical roots; nor will the procedural safeguards that respondents seek—the very safeguards present in *Branzburg*—deprive "the public [of its] . . . right to every man's evidence."³ The undisputed affidavit testimony of experienced journalists in this case indicates that the search of the *Stanford Daily's* offices for unpublished news-gathering materials may be unprecedented in our

² 408 U.S. at 698-99 (footnote omitted). See also *id.* at 690 & n.29.

³ *Id.* at 688, quoting *United States v. Bryan*, 339 U.S. 323, 331 (1950).

nation's constitutional history.⁴ That testimony is confirmed by the absence of any reported case before this one concerning such a dragnet search against the press.⁵

If the 1971 search at the *Stanford Daily* was the first of its kind, however, there are disturbing signs that the practice it launched is growing in popularity.

Since 1971, there have been at least six other known searches directed against newspapers and broadcast stations. The basic facts of these cases were similar: The searches were authorized by warrants that were issued *ex parte* and usually executed without notice or opportunity for a prior adversary hearing before an impartial judicial officer. The warrants sought evidence in the form of photographs, outtakes, notes, or other information acquired in the process of gathering the news. So far as we are aware, the applications for warrants made no allegations that the press targets were suspected of any crime, or that the targets were likely to destroy the materials if given notice that the materials were sought. While the items sought were particularly described, execution of the warrants permitted extensive

⁴ *E.g.*, Affidavit of Frank P. Haven [managing editor, *Los Angeles Times*] ¶ 5, J.A. 62-63; Affidavit of Douglas E. Kneeland [national correspondent, *New York Times*] ¶ 3, J.A. 67; Affidavit of Gene Roberts [national news editor, *New York Times*] ¶ 6, J.A. 128.

⁵ Wholesale searches of the press were not, of course, unknown in England during our colonial period. As this Court has noted, the inclusion of the Fourth Amendment in our Constitution was largely a response to "a struggle against oppression which had endured for centuries" in England—a struggle that was "largely a history of conflict between the Crown and the press," and in which "general warrants [were used] as instruments of oppression" *Stanford v. Texas*, 379 U.S. 476, 482 (1965). "The Bill of Rights was fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression." *Marcus v. Search Warrant*, 367 U.S. 717, 729 (1961). See generally N. Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* 35-39 (1937).

and close examination of materials that were unrelated to the evidence sought. In at least one case, it is alleged that the search restricted a radio station in its ability to receive news feeds from outside news services, as well as in its ability to broadcast regular news programming.⁶ Finally, in each case the target of the search was a comparatively small newspaper or broadcast station with relatively limited resources.⁷

At the time of this Court's decision in *Branzburg v. Hayes*, *supra*, 17 states had enacted statutory protections for confidential information obtained in the news-gathering process.⁸ Since that decision, such shield laws

⁶ That search, of radio station KPFK-FM in Los Angeles, is alleged to have lasted for eight and one-half hours. See Verified Complaint for Injunctive and Declaratory Relief ¶¶ 15-17, in *Pacifica Foundation, Inc. v. Davis*, No. 117257 (Cal. Super. Ct. L.A. Cty., filed March 12, 1975).

⁷ The targets of these searches have included: two affiliates of the Pacifica Radio Network, KPFA-FM, in Berkeley, California, and KPFK-FM in Los Angeles (IV Press Censorship Newsletter 25 (1974)); the *Berkeley Barb*, an underground newspaper (searched twice) (VI Press Censorship Newsletter 31 (1975)); the *Los Angeles Star*, a sexually explicit tabloid, (*id.*); and television station WJAR-TV, Providence, Rhode Island. See generally Note, *Search and Seizure of the Media: A Statutory, Fourth Amendment and First Amendment Analysis*, 28 Stan. L. Rev. 957 & n.3 (1976).

The surprise search practice that originated in this case might have become even more common if the courts below had not declared it unconstitutional. The court of appeals' decision is binding in the states of the Ninth Circuit, where the practice first occurred. The most recent known surprise search of the press occurred in September 1977 at television station WJAR-TV in Rhode Island.

⁸ Ala. Code tit. 7, § 370 (1960); Alaska Stat. § 09.25.150 (Supp. 1971); Ariz. Rev. Stat. § 12-2237 (Supp. 1971-72); Ark. Stat. Ann. § 43-917 (1964); Cal. Evid. Code § 1070 (Deering) (Supp. 1977); Ind. Code Ann. § 34-3-5-1 (1973); Ky. Rev. Stat. § 421.100 (1969); La. Rev. Stat. Ann. §§ 45-1451-1454 (Supp. 1972); Md. Ann. Code art. 35, § 2 (1971); Mich. Comp. Laws § 767.5a (Supp. 1956); Mich. Stat. Ann. § 28.945(1) (1954); Mont. Rev. Codes Ann. § 93-601-2 (Cum. Supp. 1977); Nev. Rev. Stat. § 49.275 (as amended in 1975); N.J. Rev. Stat. §§ 2A:84A-21, 2A:84A-29 (Supp. 1972-73, as

have been enacted in nine additional states.⁹ The California legislature also amended its statute in 1974 to provide for broader coverage.¹⁰ The correlation between this expansion of statutory protections for the press and the advent of surprise police searches which foreclose the assertion of the statutory protections—as well as the right to judicial balancing guaranteed by *Branzburg* in states that lack shield laws—seems more than coincidental and may be the most ominous aspect of the record in this case.¹¹ Indeed, in the court of appeals, petitioners themselves suggested that their search procedure was developed to facilitate the rapid acquisition of information from potentially uncooperative reporters about criminal activity by others.¹²

The search practice challenged here not only lacks the historical justification found so persuasive in *Branzburg*; it also threatens to impinge far more certainly and directly on First Amendment interests, and indeed makes

amended Oct. 5, 1977); N.M. Stat. Ann. § 20-1-12.1 (1973); N.Y. Civ. Rights Law (McKinney) § 79-h (1973); Ohio Rev. Code Ann. § 2739.12 (1954); Pa. Stat. Ann. tit. 28, § 330 (Purdon) (Cum. Supp. 1977); see 408 U.S. at 689 n.27.

⁹ Del. Code tit. 10, §§ 4320-4326 (1974); Ill. Rev. Stat. ch. 51, §§ 111-119 (Supp. 1977); Minn. Stat. §§ 595.021-.025 (Supp. 1977); Neb. Rev. Stat. §§ 20:144-:147 (1974); N.D. Cent. Code §§ 31-01-06.2 (1976); Okla. Stat. tit. 12, §§ 385.1, 385.3 (Supp. 1977); Or. Rev. Stat. §§ 44.510-.540 (1973); R.I. Gen. Laws §§ 9-19.1-1 to -3 (Supp. 1977); Tenn. Code Ann. §§ 24.113-.115 (Supp. 1976).

¹⁰ See pp. 18-19, *infra*; Cal. Evid. Code § 1070(c), at 151-52 (Deering) (Supp. 1977).

¹¹ Compare VI Press Censorship Newsletter 30 (1975).

¹² Appellants' Opening Brief at 25-26 (filed June 2, 1975). The affidavit supporting the warrant for the search involved in *Pacifica Foundation, Inc. v. Davis*, No. 117257 (Cal. Super. Ct., L.A. Cty., filed Mar. 12, 1975), recites that the police understood that the station manager refused to surrender the document sought on the basis of the California shield law. The search was thus obviously a device to circumvent whatever protection the statute afforded.

it impossible for the victim ever to vindicate those interests. As we show below, under these circumstances the First Amendment mandates the use of less intrusive law enforcement procedures which provide notice and opportunity to seek judicial protection before the material demanded is inspected or seized.

A. Surprise Searches of the Press Threaten Irreparable Injury to the Freedom of the Press Protected by the First Amendment.

This Court has often noted that full dissemination of information to the public is vital to enlightened discussion of events and to intelligent self-government.¹³ The Court has also recognized the crucial role of the press in informing the body politic:

"The Constitution specifically selected the press . . . to play an important role in the discussion of public affairs. Thus the press serves and was designed to serve as a powerful antidote to any abuses of power by government officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve."¹⁴

These principles undergird this Court's ruling in *Branzburg v. Hayes*, *supra*, that "news gathering is not without its First Amendment protections," and that journalists are therefore entitled to have courts balance First Amendment interests against claimed law enforcement needs, before confidential information must be produced.¹⁵

¹³ See, e.g., *Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972); *LaMont v. Postmaster General*, 381 U.S. 301 (1965); *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943). See also A. Meiklejohn, *Free Speech* 26 (1948).

¹⁴ *Mills v. Alabama*, 384 U.S. 214, 219 (1966). See also *New York Times Co. v. Sullivan*, 376 U.S. 254, 271 (1964).

¹⁵ 408 U.S. at 707. See also 28 C.F.R. § 50.10 (1976) (Department of Justice Guidelines):

This is not a case in which the government is asked "to make available to journalists sources of information not available to members of the public generally."¹⁶ The respondents invoke the First Amendment not as a sword that gives "special access" to the press, *id.*, but as a shield to deny the police special access to seize news materials in the hands of the press.¹⁷ Editorial materials located in press offices are entitled to First Amendment protection because they are necessary to the press function of informing the public—a function explicitly recognized in the amendment itself. As Mr. Justice Stewart has noted,

"The publishing business is . . . the only organized private business that is given explicit constitutional protection."¹⁸

Press searches like the one directed against the *Stanford Daily*—not itself suspected of any crime—impermissibly threaten the performance by the press of its important news dissemination function.

1. Searches Foreclose the Opportunity To Interpose First Amendment Protections and Other Lawful Objections to Disclosure of Materials.

Branzburg established that confidential information in the possession of the press enjoys qualified First Amendment protection. While the Court refused to hold that

"Because freedom of the press can be no broader than the freedom of reporters to investigate and report the news, the prosecutorial power of the government should not be used in such a way that it impairs a reporter's responsibility to cover as broadly as possible controversial public issues."

¹⁶ *Pell v. Procunier*, 417 U.S. 817, 834 (1974).

¹⁷ Cf. *Herbert v. Lando*, No. 77-7142, slip op. at 227 n.11 (2d Cir. Nov. 7, 1977).

¹⁸ Stewart, "Or of the Press," 26 *Hastings L.J.* 631, 633 (1975).

reporters have "a virtually impenetrable constitutional shield, beyond legislative or judicial control,"¹⁹ it reaffirmed that "news gathering does . . . qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated."²⁰ The Court recognized that to require the press "indiscriminately to disclose [its sources of information] on request" would seriously burden the news-gathering function in violation of the First Amendment.²¹

Under *Branzburg*, reporters must "respond to relevant questions put to them in the course of a valid grand jury investigation" ²² However, response is not required if "grand jury investigations are instituted or conducted other than in good faith."²³ Nor may a newsman be "called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation."²⁴ The Court stressed that courts have a responsibility to ensure "that grand juries . . . operate within the limits of the First Amendment as well as the Fifth."²⁵ Mr. Justice Powell, who provided the fifth vote for the 5-4 majority in *Branzburg*, emphasized in his concurrence the need in each case to "stri[k]e . . . a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct."²⁶ A court cannot strike that balance

¹⁹ 408 U.S. at 697.

²⁰ *Id.* at 681. See also *Pell v. Procunier*, 417 U.S. 817, 834 (1974) ("a journalist . . . is entitled to some constitutional protection of the confidentiality of [his] sources").

²¹ *Id.* at 682.

²² *Id.* at 690-91 (emphasis added).

²³ *Id.* at 707.

²⁴ *Id.* at 710 (Powell, J., concurring).

²⁵ *Id.* at 708.

²⁶ *Id.* at 710 (Powell, J., concurring). Mr. Justice Powell has since noted that *Branzburg* "recognized explicitly that the consti-

without an opportunity to hear and evaluate the competing interests *before* the compelled disclosure occurs.

In short, *Branzburg* rests on the premise that "the courts will be available to newsmen under circumstances where legitimate First Amendment interests require protection,"²⁷ because a newsman who believes his information is privileged "will have access to the court on a motion to quash [a subpoena] and an appropriate protective order may be entered."²⁸ This premise is readily evaded, however, if the police may resort to a warrant authorized by a magistrate *ex parte* to search a newspaper or broadcast station and so deprive it of any opportunity to assert its rights before they are lost.²⁹

tutional guarantee of freedom of the press does extend to some of the antecedent activities that make the right to publish meaningful." *Saxbe v. Washington Post Co.*, 417 U.S. 843, 859 (1974) (Powell, J., dissenting). Since *Branzburg*, the lower federal courts have reaffirmed that the First Amendment requires a case-by-case judicial balancing of interests *before* law enforcement officers seek to obtain confidential information from the news media. See, e.g., *Farr v. Pitchess*, 522 F.2d 464 (9th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976); *Carey v. Hume*, 492 F.2d 631 (D.C. Cir.), *cert. dismissed*, 417 U.S. 938 (1974); *Baker v. F&F Investment*, 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973).

²⁷ *Branzburg v. Hayes*, *supra*, 408 U.S. at 710 (Powell, J., concurring).

²⁸ *Id.* at 710 (Powell, J., concurring).

²⁹ Since the harm to First Amendment interests stems from the exposure of confidential information and the editorial process to public scrutiny, it is plain that these interests are irreparably compromised the moment the search takes place. Although petitioners suggest that after-the-fact remedies are available, the suggested remedies are wholly inadequate. For example, even if evidence unconstitutionally obtained from third parties is subject to exclusion in a state court trial in California, as petitioners argue (Zurcher Brief at 27; Bergna Brief at 24), application of the exclusionary rule is insufficient to repair the damage to news gathering. Suits for money damages (Zurcher Brief at 25-26) are similarly inadequate.

A surprise search also sweeps away all other lawful objections to the disclosure of confidential information. As noted, 26 states now have shield laws that protect the confidentiality of information possessed by the news media.³⁰ When the offices of the *Stanford Daily* were searched, California's shield law protected members of the press against being "adjudged in contempt by a judicial, legislative, [or] administrative body, or any other body having the power to issue subpoenas, for refusing to disclose . . . the source of any information procured [in connection with press activities]." ³¹ As amended in 1974, that law now extends also to "any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public." Such "unpublished information" expressly includes "notes, outtakes, photographs, tapes or other data of whatever sort . . ." ³² Indeed, present California law may protect the very materials that were the object of the search in this case.³³ Yet, if the police were to repeat their

³⁰ See p. 12, *supra*. These 26 shield laws offer protection of varying degrees. Some laws protect absolutely those matters within their purview; others qualify the protection with a balancing standard or deny it altogether in libel cases. See generally Note, *Search and Seizure of the Media: A Statutory, Fourth Amendment and First Amendment Analysis*, 28 Stan.L.Rev. 957, 960-61 (1976).

Other, nonstatutory defenses that may be asserted to a subpoena include "undue breadth, . . . improper inclusion of irrelevant information, . . . lack of authority to conduct the investigation in issue, . . . and improper issuance of a given subpoena, . . ." *In re Grand Jury Proceedings*, 486 F.2d 85, 91 (3d Cir. 1973) (citations omitted).

³¹ Cal. Evid. Code § 1070(a), (b) (Deering) (Supp. 1977).

³² Cal. Evid. Code § 1070(a), (b), (c) (Deering) (Supp. 1977).

³³ In *Pacifica Foundation, Inc. v. Davis*, No. 117257 (Cal. Super. Ct., L.A. Cty., filed March 12, 1975), the plaintiffs are seeking a judgment that the California statute as amended bars searches, as well as subpoenas, for materials that are protected against disclosure. See Note, *Search and Seizure of the Media: A Statutory, Fourth Amendment and First Amendment Analysis*, 28 Stan. L. Rev. 957,

surprise search of the *Stanford Daily* offices tomorrow, there would be no opportunity for the newspaper to interpose its statutory defenses.³⁴

2. Indiscriminate Searches Through Press Files Threaten Irreparable Injury to the Gathering and Dissemination of News.

Notice and an opportunity to assert all available defenses before an impartial judicial officer are particularly crucial where a press search is threatened. By its very nature, a search is ordinarily limitless and indiscriminate; the range of items it exposes cannot be narrowed. Even if the police seek only specific materials in a press office to which no valid claim of privilege attaches, those materials usually cannot be located without reading or examining many other materials in the office—materials irrelevant to the investigation as well as those relevant, materials that may have been acquired under a pledge of confidence and materials otherwise acquired. But, without notice, the target of the search can neither test the government's right to the materials actually sought nor obviate the ransacking of an entire press office by locating and producing them itself. The result—as in this case—is an unnecessary, wholesale, and damaging disclosure of confidential materials.³⁵

963 (1976). If the state courts accept that argument, the 1974 amendment—which was enacted after the district court's decision here—will furnish an independent, nonconstitutional basis for invalidating a post-1974 search. In these circumstances, the Court may wish to dismiss the writs of certiorari as improvidently granted and reserve its ruling on the constitutional issues for some future case. *Cf. Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1955).

³⁴ California law penalizes resistance to law enforcement officers in the execution of a search warrant. Cal. Penal Code §§ 69, 148 (Deering) (Supp. 1977).

³⁵ See, e.g., Affidavit of Edward H. Kohn ¶¶ 15-24, J.A. 73-75. In ordinary civil litigation, even where First Amendment interests are not implicated, a party seeking to discover specific documents

Such a search threatens First Amendment interests far more certainly and directly than the testimony by newsmen, under judicial supervision, that this Court required in *Branzburg v. Hayes*, *supra*. As the record in this case makes clear, indiscriminate press searches will harm protected First Amendment interests in three distinct ways.

Impairment of news gathering. Far more than the testimony required in *Branzburg*, press searches will inevitably expose to public scrutiny information confidentially obtained and the sources who supplied it.³⁶ It is by now common ground that reporters must and do rely on information provided to them in confidence.³⁷ The

is not admitted to his adversary's offices to rummage until he finds them. Under the Federal Rules of Civil Procedure, for example, he requests the desired documents and, unless his request is successfully challenged, his adversary is required to locate and produce them. Fed.R.Civ.P. 26, 34, 37. The justification for a more intrusive search in the case of persons suspected of crime—the likelihood of destruction of evidence—cannot be presumed *ex parte* where the object of the search is a newspaper or broadcast station not suspected of any criminal involvement. First Amendment interests in the latter case weigh heavily against departure from the less intrusive procedure.

³⁶ Such "exposure" may, at least initially, be confined to police; but this does not immunize the resulting "blow to the First Amendment rights." *Bursey v. United States*, 466 F.2d 1059, 1086 (9th Cir. 1972). Like political dissidents, of whom the court of appeals spoke in *Bursey*, sources of confidential information "who criticize the Government may have more to fear about disclosure to the Government than to anyone else . . ." *Id.* Indeed, some sources may be within the government itself and have special reason to fear disclosure. See Affidavit of Douglas E. Kneeland [national correspondent, *New York Times*] ¶¶ 3, 6, J.A. 67, 69-70.

³⁷ *E.g.*, *Farr v. Pitchess*, 522 F.2d 464, 467-68 (9th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976); *Carey v. Hume*, 492 F.2d 631 (D.C. Cir.), *cert. dismissed*, 417 U.S. 938 (1974); *Baker v. F & F Investment*, 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973); *Morgan v. State*, 337 So.2d 951 (1976); *Rosato v. Superior Court*, 51 Cal. App. 3d 190, 124 Cal. Rptr. 427 (1975), *cert. denied*, 427 U.S. 912 (1976); *State v. St. Peter*, 132 Vt. 266, 315 A.2d 254 (1974); *Brown v. Commonwealth*, 214 Va. 755, 204 S.E.2d 429, *cert. denied*, 419 U.S. 966 (1974).

record in the district court eloquently confirms that fact and the reasons for it.

As Walter Cronkite observed, "Broadcast news coverage, much like newspaper reporting, depends on the acquisition of facts, including those gained from confidential sources."³⁸ However, the likelihood of exposure will irreparably impair press access to these confidential sources. Douglas E. Kneeland of the *New York Times* testified by affidavit that:

"If the government is permitted to search newspaper offices or even the homes of newsmen for unpublished photographs, notes, tape recordings or other materials, that trust [that prompts sources to disclose information] will be effectively destroyed."³⁹

Newsmen will be unable to prevent this result:

"It will matter not that the newspaper or the individual newsmen is an unwilling accomplice of the government. An accomplice he will be, his hardwon reputation for independence shattered. Doors will be closed. And the public will be deprived of much that it has the need and right to know."⁴⁰

No less harmful to the vital function of the press will be the disclosure of unpublished information itself.⁴¹

It is obviously no answer to say that reporters should cease to retain unpublished confidential information in their files. The retention of such information is vital

³⁸ Affidavit of Walter Cronkite ¶ 5, J.A. 58.

³⁹ Affidavit of Douglas E. Kneeland [national correspondent, *New York Times*] ¶ 4, J.A. 68.

⁴⁰ *Id.* See also Affidavit of Gene Roberts ¶ 7, J.A. 128.

⁴¹ See Affidavit of Douglas E. Kneeland ¶ 7, J.A. 70-71; Affidavit of Fred Mann [former Managing Editor, *Stanford Daily*] ¶ 22, J.A. 87.

to the quality and accuracy of published news. Unpublished information is kept for a variety of background purposes—for example, to facilitate future amplification or corrections—as well as to provide leads for future news stories.⁴² If the press can no longer retain such information in its files lest it be seized, the quality and accuracy of news coverage will suffer, to the public detriment:

“All reporters have taken notes of factual disclosures received in confidence. If such notes are subject to police seizure, it is likely the reporters will stop bringing them back to their offices and using them as aids in preparing their stories. I am obviously concerned for the quality and character of journalism if reporters refrain from taking notes or taping interviews for fear that this raw stuff might be easily available to government officials through the device of a search warrant.”⁴³

The threat of indiscriminate searches also creates a substantial risk of self-censorship. As Gene Roberts, *New York Times* national news editor, noted:

“If reporters and photographers believe that the information they gather will be available to government officials, they will not be eager to get the sensitive story, or to track down the individual who will supply the critical information. And I, as an editor, will consider carefully before publishing facts, or a photograph, which might imply that there is more than appears.”⁴⁴

⁴² See Affidavit of Gordon Manning [Director for News, CBS News] ¶ 4, J.A. 124.

⁴³ Affidavit of Gene Roberts ¶ 9, J.A. 129. As Mr. Justice Powell has recognized, the promotion of accurate news reporting may, as here, be of constitutional significance. *Saxbe v. Washington Post Co.*, 417 U.S. 843, 854 (1974) (dissenting opinion).

⁴⁴ Affidavit of Gene Roberts ¶ 8, J.A. 128.

Press searches also threaten to compromise First Amendment interests in two other ways that were not directly at issue in *Branzburg*:

Exposure of the editorial process. The indiscriminate exposure of newsroom files to police in the course of a search will also jeopardize the editorial process. In any press search, the police will discover not only factual information, but also the written work product of reporters, editors, and publishers reflecting their appraisals and criticisms of the quality of the information available and the reports that have been published on the basis of that information. As courts have recognized, this kind of exposure

“endangers a constitutionally protected realm, and unquestionably puts a freeze on the free interchange of ideas within the newsroom. A reporter or editor . . . would often be discouraged and dissuaded from the creative verbal testing, probing, and discussion of hypotheses and alternatives which are the *sine qua non* of responsible journalism.”⁴⁵

Physical disruption. Unlike lesser government intrusions into the news-gathering process, searches of press offices also threaten physical disruption of the business of the press, and a consequent interference with the dissemination of news. Because of the severe time deadlines under which the press must operate, an extensive search can play havoc with timely publication or broadcast. As Frank Haven of the *Los Angeles Times* testified:

“The thorough disruption of day-to-day newspaper operations which would result from subjecting news-

⁴⁵ *Herbert v. Lando*, No. 77-7142, slip op. at 232 (2d Cir. Nov. 7, 1977); see *id.* at 240. See also *Bursey v. United States*, *supra*, 466 F.2d at 1084 (“Questions about the identity of persons who were responsible for the editorial content and distribution of newspaper and pamphlets . . . cut deeply into press freedom.”)

papers to the use of search warrant procedures is too obvious to require much elaboration. If law enforcement officers have the power to at any time appear at the office of a newspaper with a search warrant, systematically go through the files of a newspaper relating to a particular event, confiscating those materials which appear to suit their needs, at that point the precise, and often tight, time requirements in publishing a newspaper are disrupted, personnel are diverted from their duties, materials necessary to publish the paper may be taken, and, in a word, the ability, not to mention the constitutional right, of the newspaper to determine what will be published, and when, is put in serious jeopardy." ⁴⁶

In fact, just such interference occurred as a result of the eight and one-half hour search of the offices of KPFF-FM in Los Angeles. (See p. 12, *supra*.)

B. Notice and Opportunity for an Adversary Hearing Must Precede a Search That Threatens Irreparable Injury to First Amendment Interests.

As we have shown, much of the information typically found in a newspaper or broadcast office enjoys substantial legal protections against compelled disclosure. The First Amendment and state shield laws both protect against indiscriminate police rummaging through press files. But a surprise search negates these protections. Permitting the police to use procedures that foreclose any opportunity to invoke lawful defenses mocks this Court's assurance in *Branzburg* that judicial supervision will be available to prevent the evisceration of press freedom.

⁴⁶ Affidavit of Frank Haven [managing editor, *Los Angeles Times*] ¶ 6, J.A. 63; Affidavit of Gordon Manning [Director for News, CBS News] ¶ 5, J.A. 124.

The question here is not how much substantive First Amendment protection any particular materials might enjoy, or under what circumstances. It is not even what standards should guide those determinations. The question is whether *all* protections can be swept aside by search procedures that leave no room for any protections to be invoked."

"Although this case presents an opportunity to decide whether any person not suspected of a crime is entitled to notice and an opportunity to be heard before his premises are searched, that question need not be decided at this time. The narrower question before this Court is whether the press, whose rights are specifically mentioned in the First Amendment and whose freedom is indispensable to all who enjoy a democratic system of government, is entitled to such protection. We note that the procedural prerequisites for a valid search and seizure under the Fourth Amendment are especially strict where First Amendment interests in "freedom of speech, or of the press" are implicated. In such cases, the Fourth Amendment imposes "a higher hurdle in the evaluation of reasonableness" for a search and seizure, *Roaden v. Kentucky*, 413 U.S. 496, 504 (1973). See *United States v. Miller*, 425 U.S. 435, 444 n.6 (1976); *Lee Art Theatre, Inc. v. Virginia*, 392 U.S. 636 (1968); *Stanford v. Texas*, 379 U.S. 476 (1965); *United States v. Thirty-Seven Photographs*, 402 U.S. 363 (1971). However, as we show in text, the First Amendment of its own force requires the procedures imposed by the courts below, whatever the reach of the Fourth Amendment.

If this Court reaches the broader question of the requirements imposed by the Fourth Amendment generally on searches of non-suspects, we submit that the decision below is correct for the reasons stated in the district court's opinion and in Part II of respondents' brief. As respondents observe, if the state may search the premises of nonsuspects for evidence at will, then it may intrude without restraint upon private relationships protected by the federal Constitution, state statutes, and common law privileges. Such intrusions cannot be squared with the Fourth Amendment's prohibition against unreasonable searches. Consider, for example, the membership lists which this Court found protected by the First Amendment against disclosure compelled by court order in *NAACP v. Alabama*, 357 U.S. 449 (1958). Even if those lists were not absolutely privileged against disclosure in a criminal investigation where the NAACP was not a suspect, *NAACP v. Alabama* makes clear that the state would have to show a compelling need before any court could require production. It is therefore inconceivable

[Footnote continued]

As we now show, in the circumstances of this case, the First Amendment requires one simple but effective procedural safeguard: The compelled disclosure must be preceded by notice and an opportunity for an adversary hearing. Only then can the courts tailor and confine the disclosure of confidential information to what is appropriate under *Branzburg* and other applicable authorities. Absent that procedural protection, even an indisputable claim of privilege or other defense will fail for lack of any opportunity to assert it.

"The history of liberty has largely been the history of the observance of procedural safeguards."⁴⁸ Nowhere has this been more true than for the liberties guaranteed by the First Amendment. Under numerous decisions of this Court, government action that threatens irreparable injury to First Amendment interests must be preceded by notice and an opportunity for an adversary hearing.

In *Carroll v. President & Commissioners of Princess Anne*, 393 U.S. 175 (1968), the Court invalidated an

that, consistent with the reasonableness requirement of the Fourth Amendment, the state could evade this constitutional protection by the mere expedient of a search under warrant.

Indeed, Congress has recently shown that it is mindful of Fourth Amendment requirements in this respect. In Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510-20, Congress imposed limitations on wiretapping similar to those imposed by the courts below on physical searches. The Act requires that wiretapping be directed only against persons suspected of committing a crime or communications facilities used by such persons, *id.* § 2518(3), not nonsuspects, such as journalists not suspected of any crime. It also requires that efforts be made to minimize the need for wiretapping by using other investigative alternatives prior to obtaining authorization for wiretapping, *id.* § 2518(3)(e), and that any wiretap "be conducted in such a way as to minimize the interception of communications not otherwise subject to interception." *Id.* § 2518(5).

⁴⁸ *McNabb v. United States*, 318 U.S. 332, 347 (1943) (Frankfurter, J.).

injunction issued *ex parte* against a political rally. The Court "insisted upon careful procedural provisions, designed to assure the fullest presentation and consideration of [the proposed action] which circumstances permit."⁴⁹ The Court reasoned that the only way to prevent unlawful suppression of protected activity was to give the proponents of the rally a prior opportunity to challenge the injunction or to seek a narrowing of its provisions. The need for that procedural safeguard was particularly acute because of the political nature of the speech involved, since "[i]t is vital to the operation of democratic government that the citizens have facts and ideas on important issues before them."⁵⁰ As the Court in *Carroll* observed, "[here] the reasons for insisting upon an opportunity for hearing and notice . . . are even more compelling than in cases involving allegedly obscene books. The present case involves a rally and 'political' speech in which the element of timeliness may be important." 393 U.S. at 182.

As *Carroll* recognizes, the Court has consistently required the same procedural safeguard even in less compelling First Amendment contexts. In *A Quantity of Books v. Kansas*, *supra*, and *Marcus v. Search Warrant*, 367 U.S. 717 (1961), the Court required that the seizure of large quantities of books be tested in a prior adversary proceeding in order to avoid the danger that protected speech would needlessly and unlawfully be suppressed in the process of preventing obscene and unprotected expres-

⁴⁹ 393 U.S. at 181.

⁵⁰ *A Quantity of Books v. Kansas*, 378 U.S. 205, 224 (1964) (Harlan, J., dissenting); see *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559-60 (1976); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491-93 (1975); *Mills v. Alabama*, 384 U.S. 214, 219 (1966); *New York Times Co. v. Sullivan*, 376 U.S. 254, 271 (1964).

sion.⁵¹ Although those cases involved searches and seizures, the Court decided them under First Amendment standards and found it unnecessary to reach Fourth Amendment issues. Similarly, in other cases, the Court has insisted that censorship measures contain procedural safeguards that are adequate to "ensur[e] the necessary sensitivity to freedom of expression."⁵² And the Court recently reaffirmed that "[c]ourts will scrutinize any large-scale seizure of books, films, or other materials presumptively protected under the First Amendment to be certain that the requirements of *A Quantity of Books* and *Marcus* are fully met." *Heller v. New York*, 413 U.S. 483, 491 (1973).⁵³

The circumstances here are even more compelling than those in *Carroll*, *Marcus*, or *A Quantity of Books*, and the

⁵¹ The danger that protected conduct will be injured need not be certain. As in *Carroll* and in obscenity cases such as *A Quantity of Books v. Kansas*, *supra*, there need be only the likelihood of injury. "[O]pportunity for a fair adversary hearing must precede the action, whether or not the speech or press interest is clearly protected under substantive First Amendment standards." *Board of Regents v. Roth*, 408 U.S. 546, 575 n.14 (1972).

⁵² *Freedman v. Maryland*, 380 U.S. 51, 58 (1965); *see, e.g., Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963).

⁵³ In *Heller*, the police seized a single copy of an allegedly obscene film from a theater pursuant to a warrant issued and executed without a prior adversary hearing. This Court upheld the seizure but made clear that its decision proceeded on the assumption that a duplicate film was available to the theater, and that showing of the film could therefore continue. Hence, the danger of injury to speech interests under the particular circumstances of that case was virtually nonexistent. Where offices of a news organization are searched, however, the danger to its protected interests in confidentiality is severe and immediate. Once confidential sources or editorial materials are disclosed, the First Amendment interests at stake are irreparably harmed. *See pp. 14-23, supra*. The Court was at pains in *Heller* to make clear that the holdings of cases such as *A Quantity of Books v. Kansas*, *supra*, requiring notice and an adversary hearing prior to government action imperiling First Amendment interests, were left undisturbed. *Id.* at 491.

harm is irreparable. A surprise search of an entire news office intrudes on the freedom of the institution, expressly identified in the First Amendment, that is primarily responsible for disseminating information to the public. Where documentary materials are sought from the press by search, the risk of an unnecessarily "large-scale" search and seizure is substantial. And even where no extensive seizure occurs, the danger of wholesale obstruction to the circulation of information and ideas is great. The seizure, for example, of the only photographic negatives of a fast-breaking news event would be as effective a barrier to the dissemination of information as the seizure of the only copy of an allegedly obscene film possessed by a theater. Since the procedural safeguard of a prior adversary hearing is required in the latter case,⁵⁴ it is certainly required where information vital to the public is seized by means of a surprise press search.

As noted, the Court in *Branzburg* was careful to stress that government orders requiring journalists to produce evidence are subject to challenge by newsmen prior to disclosure, to allow First Amendment interests to be weighed against competing law enforcement interests.⁵⁵ The Court in *Branzburg* also observed that no danger there existed that the "grand juries were 'prob[ing] at will and without relation to existing need' " or "forcing wholesale disclosure of names and organizational affiliations."⁵⁶ By contrast, the *ex parte* search procedure followed in this case foreclosed the opportunity for prior judicial control. The participation of the magistrate in the warrant process did not provide the necessary con-

⁵⁴ *Heller v. New York*, *supra*, 413 U.S. at 491-93.

⁵⁵ 408 U.S. at 678, 708; *id.* at 710 (Powell, J., concurring).

⁵⁶ *Id.* at 700, citing *DeGregory v. Attorney General*, 383 U.S. 825, 829 (1966). "No attempt [was] made to require the press to publish its sources of information or indiscriminately to disclose them on request." *Id.* at 682.

trol, because the magistrate had no knowledge of the nature of the materials in the files of the newspaper or of the First Amendment interests jeopardized by disclosure. Moreover, the indiscriminate search of the *Stanford Daily's* offices—with no opportunity for the staff to locate and produce the requested photograph itself—made the danger of “wholesale disclosure” of “names” and “affiliations” an ominous reality.

The procedural rights afforded to the press by the courts below are no greater than those enjoyed in *Branzburg* and no greater than politicians, book dealers, and theater owners enjoy under *Carroll*, *A Quantity of Books*, and *Heller*. They are notice and an opportunity for an adversary hearing *before* an irreparable invasion of First Amendment interests occurs, to permit the validity and scope of that invasion to be judicially tested *before* the invasion occurs.⁵⁷ Such a procedure will permit the press to seek to establish that the materials sought are privileged, or at least to narrow the compelled disclosure to that which the court finds is justified.⁵⁸

Surprise searches of press offices are presumptively unnecessary to effectuate legitimate law enforcement needs. This Court's decisions make clear that such a serious impairment of First Amendment interests can be upheld, if at all, only “if the State demonstrates a sufficiently im-

⁵⁷ “No better instrument has been devised for arriving at the truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.” *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 171-72 (1951) (Frankfurter, J., concurring). Notice and opportunity for a hearing are, in many contexts, the core of the protection afforded by the Due Process Clauses of the Fifth and Fourteenth Amendments. *See, e.g., Goss v. Lopez*, 419 U.S. 565 (1975) (school suspension); *Bell v. Burson*, 402 U.S. 535 (1971) (driver's license suspension); *Londoner v. Denver*, 210 U.S. 373 (1908) (tax assessment).

⁵⁸ *Carroll v. President & Commissioners of Princess Anne*, *supra*, 393 U.S. at 183.

portant interest and employs means closely drawn to avoid unnecessary abridgement” of those freedoms.⁵⁹ A very heavy burden—proof that establishes reasonable cause to believe that the press would destroy evidence in the face of a subpoena or other compulsory process—must be sustained before any such search could be validated.⁶⁰ Unless such a showing can be made, law enforcement officers have less intrusive means to achieve their interests, and those means must be pursued. As the Court said in *Carroll*:

“In this sensitive field, the state may not employ ‘means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.’ *Shelton v. Tucker*, 364 U.S. 479, 488 (1960). In other words, the order must be tailored as precisely as possible to the exact needs of the case. The participation of both sides is necessary for this purpose. Certainly, the failure to invite participation of the party seeking to exercise First Amendment rights reduces the possibility of a narrowly drawn order, and substantially imperils the protection which the Amendment seeks to assure.”⁶¹

⁵⁹ *Buckley v. Valeo*, 424 U.S. 1, 25 (1976). *See also United States v. Robel*, 389 U.S. 258, 268 (1967).

⁶⁰ Because of the danger that a search of press offices will result in a prior restraint on publication or otherwise obstruct the flow of information to the public, the procedural safeguard of notice and opportunity for a hearing should be dispensed with only where there is a substantiated and convincing showing to a magistrate of a danger that evidence will be destroyed. The courts below expressly recognized an exception for that rare situation. *See* 353 F. Supp. at 133.

However, there was nothing before the magistrate in this case that even suggested a danger that evidence would be destroyed in the face of compulsory process. And there is no basis for any assumption that the press generally would defy the law by destroying evidence that has been requested by subpoena or similar process, in the face of criminal penalties for such conduct.

⁶¹ 393 U.S. at 183-84.

Law enforcement officials can follow procedures that include notice and opportunity for an adversary hearing without impairing in any way legitimate law enforcement interests. Experience with civil discovery and criminal subpoenas shows conclusively that it is feasible to obtain evidence by means that permit orderly assertion of objections and effective containment of the materials disclosed. Use of such means will not deprive law enforcement officers of any evidence to which they are legally entitled; at most, it will briefly postpone access to that evidence until entitlement can be determined by an impartial judicial officer in light of the facts known to all of the parties.⁶² In this respect the procedural issue here contrasts markedly with the assertions of substantive protection for news gathering that were made in cases like *Branzburg v. Hayes*, *supra*, and *Pell v. Procunier*, *supra*. Respondents here seek only a fair opportunity to assert already recognized legal protections in advance of disclosure of protected materials. They can be afforded that opportunity without depriving law enforcement officers of any evidence to which they have been heretofore allowed access.

The subpoena procedure required by the courts below affords the minimum procedural safeguards consistent with the First Amendment and the decisions of this Court. It is certainly within the remedial power of the federal courts to require that procedure.⁶³ The Constitution does not, of course, prescribe the precise manner in which notice and an opportunity for hearing must be provided or the label to be given to the procedure. Public agencies retain the flexibility to adopt procedures that will accom-

⁶² See 86 Harv.L.Rev. 1317, 1333 (1973).

⁶³ See *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971).

modate their needs to constitutional requirements.⁶⁴ The guiding principle, established by this Court's decisions and adopted by the courts below, is that governmental seizure of information in the hands of the press must be preceded by notice and opportunity for an adversary hearing. "[T]here is no place within the area of basic freedoms guaranteed by the First Amendment for [*ex parte*] orders where no showing is made that it is impossible to serve or to notify the opposing parties and to give them an opportunity to participate." *Carroll v. President & Commissioners of Princess Anne*, *supra*, 393 U.S. at 180.

II. THE CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976 AUTHORIZES THE FEES AWARD IN THIS CASE.

In *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 262 (1975), this Court held that "the circumstances under which attorneys' fees are to be awarded and the range of discretion of the courts in making those awards are matters for Congress to determine." Congress reached just such a determination in the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 ("the Act").⁶⁵ As Senator Tunney stated in introducing the bill before the Senate, "The purpose and effect of [the Act] is simple":

"[I]t is to allow the courts to provide the traditional remedy of reasonable counsel fee awards to private citizens who must go to court to vindicate

⁶⁴ See *Freedman v. Maryland*, *supra*, 380 U.S. at 58-60.

⁶⁵ See 122 Cong. Rec. H12,159 (daily ed. Oct. 1, 1976) (remarks of Rep. Drinan); *id.* at H12,161 (remarks of Rep. Railsback); *id.* at H12,163 (remarks of Rep. Kastenmeier); *id.* at H12,165 (remarks of Rep. Seiberling); 122 Cong. Rec. S16,251 (daily ed. Sept. 21, 1976) (remarks of Sen. Scott); *id.* at S16,252 (remarks of Sen. Kennedy); 122 Cong. Rec. S16,431 (daily ed. Sept. 22, 1976) (remarks of Sen. Hathaway); 122 Cong. Rec. S16,491 (daily ed. Sept. 23, 1976) (remarks of Sen. Tunney).

their rights under our civil rights statutes. The Supreme Court's recent *Alyeska* decision has required specific statutory authorization if Federal courts are to continue previous policies of awarding fees under all Federal civil rights statutes. This bill simply applies the type of 'fee shifting' provision already contained in titles II and VII of the 1964 Civil Rights Act to the other civil rights statutes which do not already specifically authorize fee awards."⁶⁶

Congress plainly intended that prevailing plaintiffs should, barring special circumstances, recover attorneys' fees under the Act. The language of the Act closely parallels the attorneys' fees award provisions of Title II of the Civil Rights Act of 1964 and of the Emergency School Aid Act of 1972.⁶⁷ In decisions interpreting the language of those two statutes, this Court has held that "the successful plaintiff 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.'"⁶⁸ Congress cited those decisions as incorporating the approach it wanted courts to take in construing the 1976 legislation.⁶⁹

⁶⁶ 121 Cong. Rec. S14,975 (daily ed. Aug. 1, 1975). See also 122 Cong. Rec. H12,154 (daily ed. Oct. 1, 1976) (remarks of Rep. Railsback) ("[s]o what we are really doing is codifying the practice that was going on prior to the *Alyeska* case"); *id.* at H12,159 (remarks of Rep. Drinan); *id.* at H12,161 (remarks of Rep. Railsback); *id.* at H12,163 (remarks of Rep. Kastenmeier); 122 Cong. Rec. S16,252 (daily ed. Sept. 21, 1976) (remarks of Sen. Kennedy) ("it is intended simply to expressly authorize the courts to continue to make the kinds of awards of legal fees that they had been allowing prior to the *Alyeska* decision"); 122 Cong. Rec. S16,431 (daily ed. Sept. 22, 1976) (remarks of Sen. Hathaway).

⁶⁷ § 204(a), 78 Stat. 244, 42 U.S.C. § 2000a-3; 20 U.S.C. § 1617.

⁶⁸ *Northercross v. Board of Education*, 412 U.S. 427, 428 (1973), quoting *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968).

⁶⁹ See S. Rep. No. 1011, 94th Cong., 2d Sess. 4 (1976) (hereinafter "S. Rep."); H.R. Rep. No. 1558, 94th Cong., 2d Sess. 9 (hereinafter

In enacting the Civil Rights Attorney's Fees Awards Act, Congress exercised its "power and judgment"⁷⁰ to award attorneys' fees to prevailing plaintiffs in Section 1983 actions. Petitioners seek to avoid that judgment by arguing (1) that the Act may not be retroactively applied to them and (2) that fees may not be awarded against a defendant who enjoys an absolute immunity from damage liability or a defendant who enjoys a qualified immunity and who has acted in good faith. Both arguments are diametrically opposed to the plain language and legislative history of the Act and are contrary to the decision of every federal court of appeals that has ruled on the issues. They are arguments that petitioners should address to Congress and not to this Court.

A. The Legislative History of the Act Plainly Manifests a Congressional Intent To Apply the Act to all Cases Pending on the Date of Its Enactment.

Petitioners have argued that the Act should not be applied retroactively to provide for an award of attorneys' fees for services rendered before the effective date of the Act. The principal argument advanced is that a retroactive application of the Act would result in a "manifest injustice" and would, therefore, be inconsistent with the analysis of this Court in *Bradley v. School Board of the City of Richmond*, 416 U.S. 696 (1974). However, that argument totally misperceives the thrust of *Bradley*. Indeed, the *Bradley* decision compels a retroactive application of the Act to all cases pending on the date of its enactment.

"H.R. Rep.") ("prevailing plaintiffs should ordinarily recover their counsel fees. *Newman v. Piggie Park Enterprises, supra*; *Northercross v. Memphis Board of Education, supra*").

⁷⁰ *Alyeska Pipeline Service Co. v. Wilderness Society, supra*, 421 U.S. at 263.

The central principle of the *Bradley* decision is "that a court is to apply the law in effect at the time that it renders its decision unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary."⁷¹ Applying that principle to the attorneys' fees award provision of the Emergency School Aid Act of 1972, the Court in *Bradley* looked first to the legislative history of that Act. After finding that the legislative history was not clear on the retroactivity question, the Court inquired into whether a retroactive application of the statute would result in a "manifest injustice," and concluded that no such injustice would result. This Court then reversed the court of appeals' refusal to authorize an award of attorneys' fees.

In contrast to the statute considered in *Bradley*, the legislative history of the Civil Rights Attorney's Fees Awards Act is not silent on the retroactivity question. Rather, it is unmistakably clear that Congress intended the Act to apply to all cases pending at the time of its enactment. The House Report plainly states:

"In accordance with applicable decisions of the Supreme Court, the bill is intended to apply to all cases pending on the date of enactment as well as all future cases. *Bradley v. Richmond School Board*, 416 U.S. 696 (1974)."⁷²

During the course of the House debates Congressman Drinan, the sponsor of the House bill, noted, without objection:

"This bill would apply to cases pending on the date of enactment. It is the settled rule that a change in statutory law is to be applied to cases in litigation."⁷³

⁷¹ *Id.* at 711 (emphasis added).

⁷² H.R. Rep. at 4 n.6. See also S. Rep. at 5.

⁷³ 122 Cong. Rec. H12,160 (daily ed. Oct. 1, 1976).

A similar point was made by Congressman Anderson:

"MR. BEARD of Tennessee. . . . is there any retroactive nature of this piece of legislation . . . ?

MR. ANDERSON of Illinois. Mr. Speaker, if the gentleman will yield, it would apply to cases now pending"

In the Senate debates Senator Abourezk, manager of the bill, observed, again without contradiction:

"The Civil Rights Attorneys' Fees Awards Act authorizes Federal courts to award attorneys' fees to a prevailing party in suits presently pending in the Federal courts."⁷⁴

Indeed, the House defeated by a vote of 268-104 a motion to recommit the bill for the purpose of obtaining an amendment to make the Act prospective only.⁷⁵

As this Court held in *Bradley*, a clear manifestation of legislative intent is dispositive of whether a statute should be given retroactive application. In this case the unambiguous legislative history compels a retroactive application of the Civil Rights Attorney's Fees Awards Act. Indeed, every court of appeals that has addressed the retroactivity question has so held.⁷⁶

This legislative history also fully answers petitioners' claim that the retroactive award of attorneys' fees against public officials who did not knowingly violate constitu-

⁷⁴ *Id.* at H12,155.

⁷⁵ 122 Cong. Rec. S17,052 (daily ed. Sept. 29, 1976).

⁷⁶ 122 Cong. Rec. H12,166 (daily ed. Oct. 1, 1976).

⁷⁷ *Wheaton v. Knefel*, 562 F.2d 550 (8th Cir. 1977); *Gates v. Collier*, 559 F.2d 241 (5th Cir. 1977); *Beazer v. New York City Transit Authority*, 558 F.2d 97 (2d Cir. 1977); *Bond v. Stanton*, 555 F.2d 172 (7th Cir. 1977); *Martinez Rodriguez v. Jiminez*, 551 F.2d 877 (1st Cir. 1977). Two circuit courts have applied the Act retroactively to cases pending on the date of its enactment without discussing the retroactivity issue. *Franklin v. Shields*, No. 75-2057, slip op. (4th Cir., Sept. 19, 1977); *Seals v. Quarterly County Court*, 562 F.2d 390 (6th Cir. 1977).

tional standards gives rise to a "manifest injustice" within the meaning of *Bradley*. *Bradley* holds that claims of "manifest injustice," such as those raised here, are simply not germane where Congress has clearly expressed its will. Thus, an analysis of the purported impact of the Act is plainly not appropriate in this case.⁷⁵

⁷⁵ Aside from its lack of materiality in this case, petitioners' manifest injustice assertion has four fatal flaws:

(1) *Bradley*, far from supporting petitioners' argument, refutes it. In rejecting the school board's manifest injustice claim in that case, the Court emphasized (a) that plaintiffs had rendered a substantial social service by bringing the school board into compliance with its constitutional mandate; (b) that no matured or unconditional right would be infringed by a retroactive application of the Act; and (c) that "there is no indication that the obligations under [the attorneys' fee provision] if known, rather than simply the common-law availability of an award, would have caused the Board to order its conduct so as to render this litigation unnecessary and thereby preclude the incurring of such costs." 416 U.S. at 721. Similar considerations undercut any claim of manifest injustice in the instant case. Plaintiffs have vindicated an important social interest; and petitioners can assert no matured rights that would be adversely impacted by a retroactive application of the Act. Moreover, at all relevant times in this lawsuit the possibility of an attorneys' fees award to plaintiffs was a known risk of litigation. See, e.g., *La Raza Unida v. Volpe*, 57 F.R.D. 94 (N.D. Cal. 1972), *aff'd*, 488 F.2d 559 (9th Cir. 1973). See also *Brandenberger v. Thompson*, 494 F.2d 885 (9th Cir. 1974). Petitioners cannot, therefore, assert that the Act imposed on them an unforeseen liability which, if known, would have altered their course of conduct.

(2) Petitioners' suggestion that they will bear the expense of the attorneys' fees award is factually incorrect. The record demonstrates that under the California indemnification statute, the city and county (not petitioners) will pay the award.

(3) The legislative history of the Act plainly indicates that Congress intended to allow for the imposition of attorneys' fees against public officials in both their official and individual capacities. See S. Rep. at 5: "[I]t is intended that the attorneys' fees, like other items of costs, will be collected either directly from the official, in his official capacity, from funds of his agency or under his control, or from the State or local government (whether or not the agency or government is a named party)." (footnotes omitted).

(4) Congress cited this very case as an example of a case that correctly applied "appropriate standards" in awarding attorneys' fees. S. Rep. at 6.

B. Congress Did Not Intend the Common Law Immunity Doctrines To Insulate Public Officials From Attorneys' Fees Awards.

Petitioners argue that the common law immunities that protect certain public officials from damage liability under Section 1983⁷⁶ should be extended so as to insulate such officials from an attorneys' fees award under the Act.⁸⁰ That argument is addressed to the wrong forum:

⁷⁶ See, e.g., *Imbler v. Pachtman*, 424 U.S. 409 (1976) (absolute immunity for prosecutor against damage liability); *Wood v. Strickland*, 420 U.S. 308 (1975) (qualified immunity for school officials against damage liability); *Scheuer v. Rhodes*, 416 U.S. 232 (1974) (qualified immunity for state executive officials against damage liability); *Pierson v. Ray*, 386 U.S. 547 (1967) (absolute immunity for judges and qualified immunity for police officers against damage liability); *Tenney v. Brandhove*, 341 U.S. 367 (1951) (absolute immunity for legislators against damage liability).

⁸⁰ Petitioners press no claim that the Eleventh Amendment bars the award of attorneys' fees in this case. Nor could they. This Court has clearly held that the Eleventh Amendment does not preclude a monetary recovery from counties or other political subdivisions of the state. *Edelman v. Jordan*, 415 U.S. 651, 667 n.12 (1974); *Lincoln County v. Luning*, 133 U.S. 529, 530 (1890); see *Developments in the Law—Section 1983 and Federalism*, 90 Harv. L. Rev. 1133, 1195 (1977). This action was brought against city and county officials, and any recovery will be paid by those political subdivisions. The Eleventh Amendment is not, therefore, involved in this lawsuit.

This case does not raise the Eleventh Amendment considerations posed by *Finney v. Hutto*, 548 F.2d 740 (8th Cir. 1977), *cert. granted*, 46 U.S.L.W. 3261 (U.S. Oct. 18, 1977). In *Hutto*, the Eighth Circuit held that an award of attorneys' fees under the Act against a state is not barred by the Eleventh Amendment. Every other circuit that has addressed the issue has agreed. *Seals v. Quarterly County Court*, 562 F.2d 390 (6th Cir. 1977); *Gates v. Collier*, 559 F.2d 241 (5th Cir. 1977); *Bond v. Stanton*, 555 F.2d 172 (7th Cir. 1977); *Martinez Rodriguez v. Jiminez*, 551 F.2d 877 (1st Cir. 1977). That result is, we submit, correct for two reasons:

(1) The Act is "'appropriate legislation' for the purposes of enforcing the provisions of the Fourteenth Amendment . . ." and the Eleventh Amendment does not, therefore, bar an attorneys' fees award against the state. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976).

[Footnote continued]

The issue is one for Congress, which has squarely rejected petitioners' view.

The thrust of petitioners' argument appears to be that the financial impact of an attorneys' fees award is no different from that of the monetary damage claims that are barred by the common law immunities, and that the Act therefore should be construed to preclude fees awards against a defendant who is covered by one of those immunities.⁵¹ That argument is misguided and should be rejected.

(2) An award of attorneys' fees to a prevailing plaintiff is not a monetary judgment against the state of a type that is barred by the Eleventh Amendment. The financial burden imposed on the state by a fees award is merely an ancillary effect of prospective compliance with constitutional standards. Compare *Edelman v. Jordan*, 415 U.S. 651 (1974), with *Ex parte Young*, 209 U.S. 123 (1908). See also Note, *Attorneys' Fee Awards and the Eleventh Amendment*, 88 Harv. L. Rev. 1875, 1896 (1975).

⁵¹ Petitioners Bergna and Brown also suggest that "[t]he reasons underlying the damages immunity of *Imbler v. Pachtman*, *supra*, also support an immunity against declaratory and/or injunctive actions for prosecutors and those who carry out judicial orders, at least when, as here, they participate in the good faith exercise of judicial functions." Bergna Brief at 30 n.21. That proposition has been uniformly rejected by the circuit courts. See, e.g., *Universal Amusement Co. v. Vance*, 559 F.2d 1286 (5th Cir. 1977) (prosecutorial immunity against damages does not bar § 1983 injunctive action against prosecutor); *Person v. Association of the Bar*, 554 F.2d 534 (2d Cir.), cert. denied, 46 U.S.L.W. 3293 (U.S. Oct. 31, 1977) (judicial immunity against damages does not bar § 1983 action for injunctive relief against Justices of Supreme Court, Appellate Division); *Drollinger v. Milligan*, 552 F.2d 1220 (7th Cir. 1977) (judges and officers of the court are not immune from § 1983 suits seeking equitable relief); *Timmerman v. Brown*, 528 F.2d 811 (4th Cir. 1975) (immunity doctrine does not protect qualified officials from § 1983 injunctive action); *Fowler v. Alexander*, 478 F.2d 694 (4th Cir. 1973) (judicial immunity against damages does not bar § 1983 action for injunctive relief); *Conover v. Montemuro*, 477 F.2d 1073 (3d Cir. 1973) (judicial immunity against damages does not bar § 1983 injunctive action against a family division judge and a district attorney). See also McCormack & Kirkpatrick, *Immunities of State Officials Under Section 1983*, 8 Rut.-Cam. L.J. 65, 79 (1976) ("the lower courts generally have held that judicial immunity does

In the first place, petitioners' argument blurs some critical distinctions between damage awards and awards of attorneys' fees.⁵² Unlike a damage award, an award of attorneys' fees does not purport to indemnify a victim for a loss or to punish a wrongdoer for his conduct. The award arises, not from the harm suffered by the plaintiff as the result of an alleged wrongdoing, but rather from expenses incurred in seeking vindication of his rights through court litigation.⁵³ Presumably for this reason, Congress correctly decided that attorneys' fees should be collected "like other items of costs,"⁵⁴ and not as damages.

More significantly, the very cases on which petitioners rely in their argument recognize that the question of the availability of a common law immunity defense in Section 1983 actions was "one essentially of statutory construction."⁵⁵ In deciding whether such defenses could be asserted against Section 1983 damage claims, this Court identified as the threshold issue whether "Congress had intended to restrict the availability in § 1983 suits of those immunities which historically, and for reasons of public policy, had been accorded to various categories of officials." *Imbler v. Pachtman*, 424 U.S. 409, 417-18

not extend to actions for injunctive relief"). See also Note, *The Federal Injunction as a Remedy for Unconstitutional Conduct*, 78 Yale L.J. 143, 146 n.17 (1968) (listing numerous cases in which injunctive relief against constitutional violations by police was granted under § 1983).

⁵² See *Fitzpatrick v. Bitser*, 427 U.S. 445, 460 (1976) (Stevens, J., concurring); cf. *Fairmont Creamery Co. v. Minnesota*, 275 U.S. 70 (1927) (costs assessed against the state by the Supreme Court in case appealed to test the constitutional validity of a state criminal statute).

⁵³ See generally Note, *Attorneys' Fee Awards and the Eleventh Amendment*, 88 Harv. L. Rev. 1875, 1895 (1975).

⁵⁴ S. Rep. at 5 n.6.

⁵⁵ *Wood v. Strickland*, 420 U.S. 308, 316 (1975) (footnote omitted). See, e.g., *Imbler v. Pachtman*, *supra*; *Pierson v. Ray*, *supra*.

(1976). In answering that question, the Court concluded that the Congress which originally enacted Section 1983 did not intend to eliminate the traditional immunity against damage awards of several types of public officials.⁸⁶

Notwithstanding the emphasis on legislative intent in the cases they cite, petitioners do not address the legislative history of the Act from which they seek immunity. Rather, they press considerations that were plainly before and rejected by Congress in its deliberations on the Civil Rights Attorney's Fees Awards Act. Indeed, the legislative history of the Act is unmistakably clear: Congress did not intend to extend the common law immunities of prosecutors and police officers to insulate them from an award of attorneys' fees made against them in their official capacities in Section 1983 actions.⁸⁷

⁸⁶ *Tenney v. Brandhove*, *supra* (legislators); *Pierson v. Ray*, *supra* (judges and police officers); *Scheuer v. Rhodes*, *supra* (executive officials); *Wood v. Strickland*, *supra* (school officials); *Imbler v. Pachtman*, *supra* (prosecutors).

⁸⁷ Without citation to authority, Petitioners Bergna and Brown challenge Congress' constitutional authority under § 5 of the Fourteenth Amendment to authorize the award of attorneys' fees against state public officials. However, the position petitioners advance would emasculate the broad grant of congressional authority in § 5 of the Fourteenth Amendment and simply cannot be reconciled with this Court's decisions upholding congressional exercise of that power. See, e.g., *Ex parte Virginia*, 100 U.S. 339 (1879); *Katzenbach v. Morgan*, 384 U.S. 641 (1966); *Oregon v. Mitchell*, 400 U.S. 182 (1970); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1975). In *Ex parte Virginia*, *supra*, the Court held:

"Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power." 100 U.S. at 345-46.

Congress enacted the Civil Rights Attorney's Fees Awards Act to protect private actions to enforce our civil rights laws. Congress

To the contrary, Congress perceived that the very unavailability of damage awards against such officials was an affirmative reason to authorize awards of attorneys' fees against them.

"Furthermore, while damages are theoretically available under the statutes covered by H.R. 15460, it should be observed that, in some cases, immunity doctrines and special defenses, available only to public officials, preclude or severely limit the damage remedy. Consequently awarding counsel fees to prevailing plaintiffs in such litigation is particularly important and necessary if Federal civil and constitutional rights are to be adequately protected. To be sure, in a large number of cases brought under the provisions covered by H.R. 15460, only injunctive relief is sought, and prevailing plaintiffs should ordinarily recover their counsel fees." ⁸⁸

As a consequence, Congress was careful specifically to include public officials within the reach of the legislation.

"As with cases brought under 20 U.S.C. § 1617, the Emergency School Aid Act of 1972, defendants in these cases are often State or local bodies or State or local officials. In such cases it is intended that the attorneys' fees, like other items of cost, will be collected either directly from the official, in his official capacity, from funds of his agency or under his control, or from the State or local government (whether or not the agency or government is a named party)." ⁸⁹

reasonably believed that, without such legislation, those civil rights laws would "become mere hollow pronouncements." S. Rep. at 6. It is manifest that the Act is, in this Court's words, legislation that is "adapted to carry out the objects the amendments have in view."

⁸⁸ H.R. Rep. at 9 (footnote omitted).

⁸⁹ S. Rep. at 5 (footnotes omitted). In this case, by California statute, the fees will be paid by local government agencies, not by the individual petitioners. Since the immunity doctrines are rooted

[Footnote continued]

Circuit courts that have reviewed this legislative history have unanimously concluded that Congress did not intend to immunize public officials, sued in their official capacity, from awards of attorneys' fees under the Act.⁹⁰ Other circuit courts have approved such awards without discussion.⁹¹

Indeed, it cannot be questioned that petitioners are among the class of public officials against whom fees may be awarded under the Act. Twice the Senate cited this very case as exemplary of the "traditionally effective remedy of fee shifting" that the Act was intended to restore.⁹² Such unusually direct congressional guidance provides a simple, but dispositive, answer to petitioners' immunity claim.

in the view that law enforcement officials should not incur personal liability for certain public acts, those doctrines would be inapplicable here even if Congress had not specifically foreclosed them.

⁹⁰ *Bond v. Stanton*, 555 F.2d 172 (7th Cir. 1977); *Universal Amusement Co. v. Vance*, 559 F.2d 1286 (5th Cir. 1977).

⁹¹ See, e.g., *Seals v. Quarterly County Court*, 562 F.2d 390 (6th Cir. 1977); *Martinez Rodriguez v. Jiminez*, 551 F.2d 877 (1st Cir. 1977).

⁹² S. Rep. at 4, 6. Congressional citation to this case also makes clear that the district court properly exercised its discretion in awarding fees:

"It is intended that the amount of fees awarded under S. 2278 be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases and not be reduced because the rights involved may be nonpecuniary in nature. The appropriate standards . . . are correctly applied in such cases as *Stanford Daily v. Zurcher*, 64 F.R.D. 680 (N.D. Cal. 1974)" *Id.* at 6.

CONCLUSION

For these reasons, the Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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December 17, 1977

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APPENDIX A

[Facsimile]

HAROLD W. ANDERSEN
President

World-Herald Square
Omaha, Nebraska 68102
(402) 444-1000

December 16, 1977

Mr. Jack C. Landau
Reporters Committee for Freedom of the Press
Room 1112
1750 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Dear Mr. Landau:

You asked for my opinions about the problems of publishers who are faced with court orders that infringe on freedom of the press.

From our experience in *Nebraska Press Association v. Stuart*, I know that the legal costs required to fight invalid court orders can be high. The legal fees in *Nebraska Press Association v. Stuart* totaled \$106,000.

When the Supreme Court agreed to review the Nebraska case, the financial burden became so great that publishers of the small newspapers in our state solicited help from other state press associations. The Nebraska Broadcasters Association also went outside for help.

Donations of \$38,000 were eventually received, reducing the burden of the Nebraskans to \$68,000.

As president of The Omaha World-Herald and former chairman of the American Newspaper Publishers Association, it is my opinion that a number of publishers who are faced with legal costs of that magnitude would be

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extremely cautious about asserting their legal rights under the First Amendment, even if they were fairly sure they would eventually win.

For those reasons, I hope that the Supreme Court will uphold the award of \$47,000 under the Civil Rights Attorneys Fees Act in the *Stanford Daily* case.

Sincerely,

/s/ Harold W. Andersen
HAROLD W. ANDERSEN

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